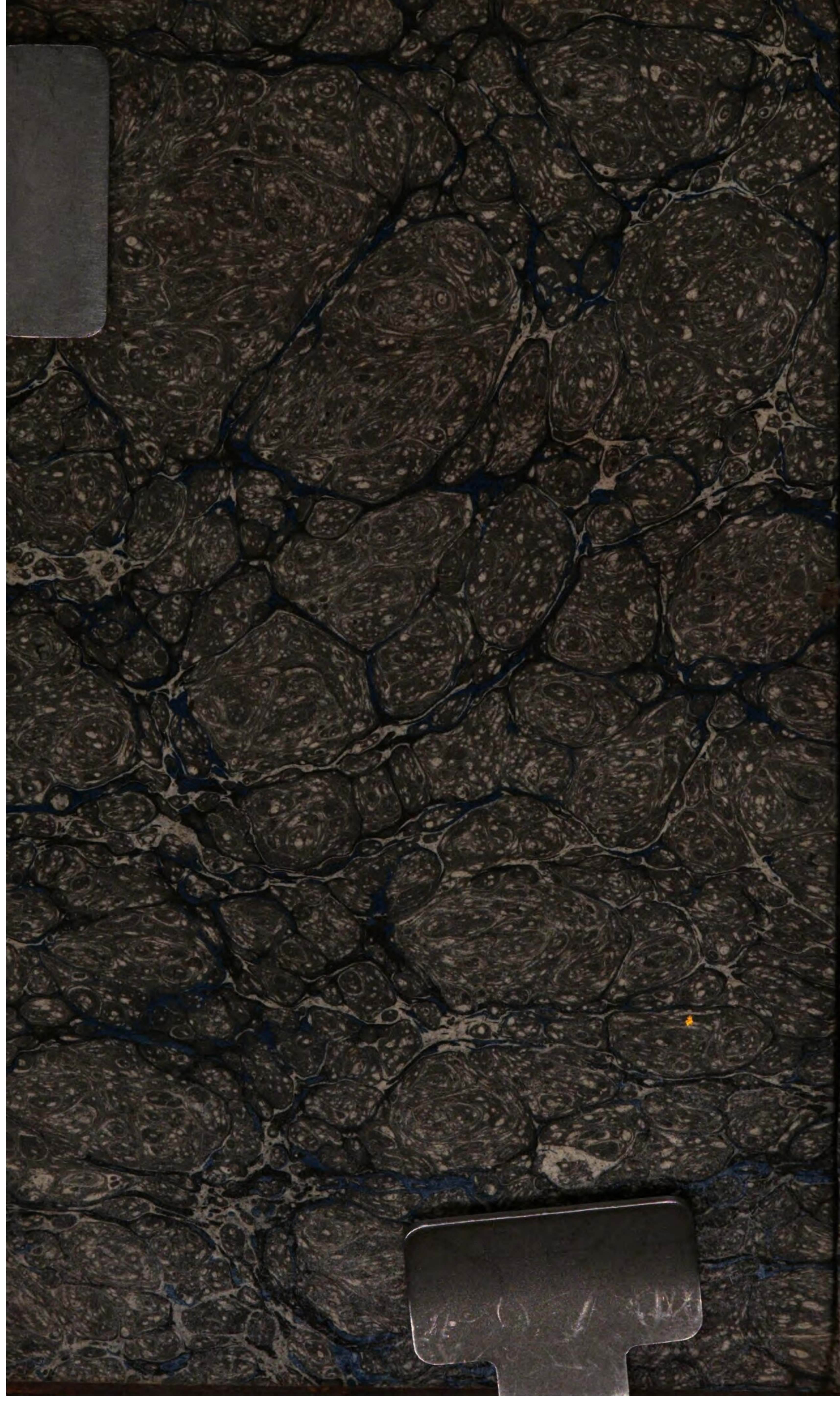
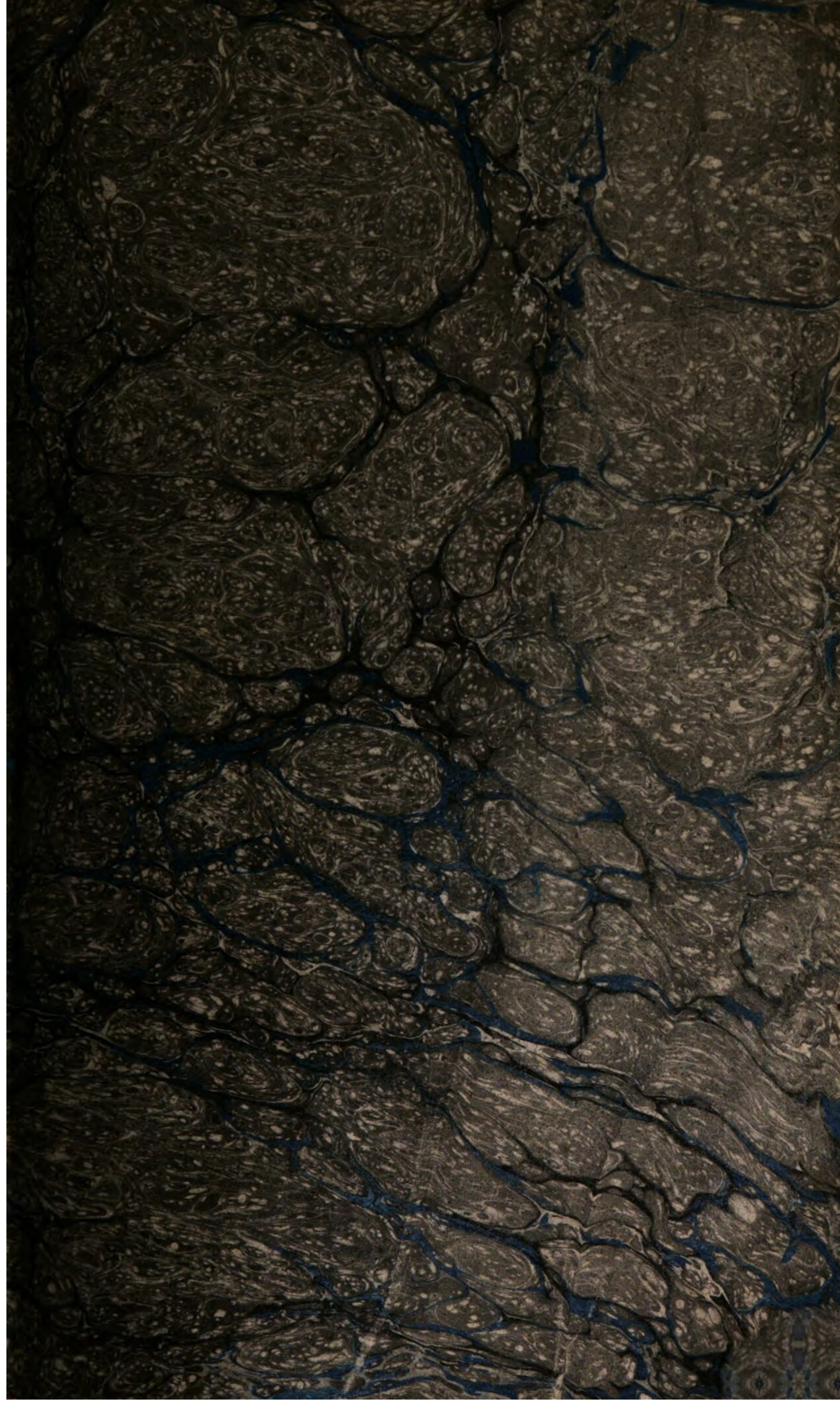








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E U N O M U S:

O R,

D I A L O G U E S

CONCERNING THE

LAW AND CONSTITUTION

O F

E N G L A N D.

W I T H

An E S S A Y on D I A L O G U E.

By E D W A R D W Y N N E, Esq.

Late of the INNER TEMPLE.

The S E C O N D E D I T I O N.

V O L U M E II.

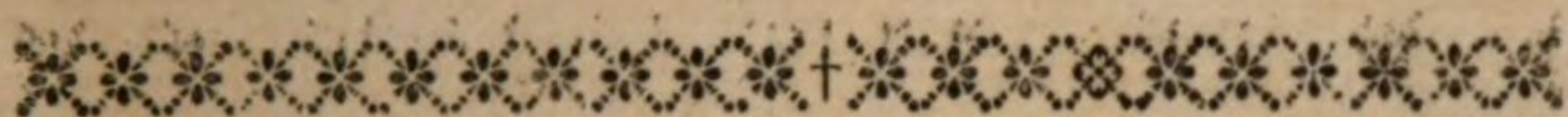
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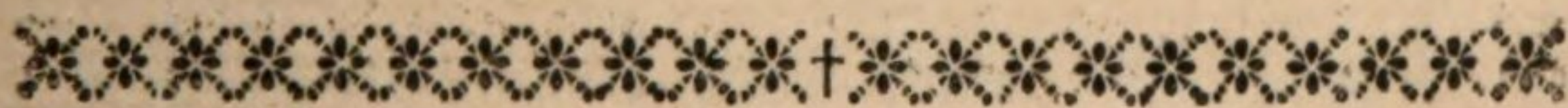


E U N O M U S.

D I A L O G U E II.

Sunt Jura; sunt formulæ de omnibus rebus constitutæ, ne quis aut in genere Injuriam aut ratione actionis errare possit: expressæ sunt enim ex uniuscujusque damno, dolore, incommodo, calamitate, injuria publicæ a Prætore Formulæ, ad quas privata lis accomodatur.

Cic. pro. Q. Rosc. §. 8.



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E U N O M U S.

D I A L O G U E II.

§. 1. **A**BOUT a week after the former visit, Policrites determined to put his Friend in mind of the promise he then made him, of continuing the subject of their former conversation.

Accordingly he set out early in the morning, and found Eunomus enjoying the serenity of the season, under the shade of an aged oak, in a field not far from the house. I hope (said he to Eunomus) you will not think I intend to be less attentive to your discourse, tho' on a dry subject, when I propose that you should begin it where you are. What conversation can be more

agreeable than that transcribed from the Tusculan retreat? Or do you think these fields are more averse to Law, than the "Olive grove of Academe" was to Philosophy?

Not to canvass the reality of the charming conversations laid in those places (replied Eunomus, with some rapture) you surely do not forget, that the existence of those Athenian shades you mention, were thought, even by a friend of Plato's, to have been chiefly in Plato's writings. And I can not help thinking, that many of those haunts of philosophers and poets we read of, if not altogether created, are chiefly immortalized by description. Undoubtedly it is in the power of fancy to make the reflection often more agreeable, than the real images themselves: either by separating certain circumstances, which may deform the things them-

themselves; or by combining in the imagination what Nature has kept distinct. But, I know not how, the few Moderns who have printed conversations, have generally been so far of your opinion, as to lay the scene of them out of doors; either, we are told, they were held in a garden, in an evening's walk, or under a rock by the sea side. Whether all this is done by way of improving upon the Antients; or whether writers of this cast, think by such plastic scenery to work upon the minds of their readers, and to pre-engage the affections on their side, by transfusing a calm of mind, most proper for their disquisitions, I will not determine: but that method will not be so proper for us. The assistance of books will be so necessary to perform in any degree, what you asked of me, that without any insinuation of your

being likely to listen to the bleating of yonder sheep, rather than to me ; or keeping your eye fixed on the corn, some time after I have done talking of trespasses : Without any suspicions (I say) of this kind, it will be more adviseable for us to adjourn to the study

. . . . Which Policrites readily agreed to, when Eunomus had promised him, that to avoid the interruption they met with last time, he would not be at home to any one.

§. 2. When they had retired within doors, and were seated, Policrites began, by observing, that whatever connection in Theory might subsist, tho' he much doubted, whether there was any connection between the several branches of our Law, as they properly fall under the attention and practise of Lawyers, he was amazed to think, how
they

they could ever be examined by the same person: many of them seeming to be a profession of themselves, and treated as such, in reality, by those who addict themselves to one branch only, however dependent that branch might be on others. Do but consider (said he) the species of men called special Pleaders: a life occupied in drawing declarations, pleas, and demurrers! These people furnish the language and conversation of Courts; yet few of them are seen there themselves; like Poets, they plan the Drama, which others are left to perform. And then turn your eye on the Conveyancers, what heaps of precedents are they forced to examine, transcribe and imitate? There are others again, always upon the wing; their life one continued scene of controversy, with Plaintiff and Defendant perpetually

ringing in their ears! If they had the real ubiquity which the law figuratively ascribes to the King, of “being present in all his Courts at once,” it would scarce answer their purpose, unless they had as many eyes, ears, and tongues, as Virgil’s Fame. Then of what a jargon of different languages are our Laws composed, and commented in? I would even consent to have our own native tongue proscribed from our Courts, rather than have it increase the variety and discord of our style; when any one language, either Latin or French, (which, however, in our use of them, are so patched and party-coloured, as to be full as much one as the other) would express the sense with equal clearness and precision. Besides this, the very Courts are barriers to their own Counsel; the experience of Common Law and Equity being too diffu-

diffusive to mix well together. Consider all this, and tell me, what leisure can they have to examine the theory of their own particular Art? How much less can they be able to form an acquaintance with History, and the genius of the whole English Law and Constitution? And after this, to soar with Plato till they reach the spirit of all Laws, derived from the nature, faculties, and situation of man, as endowed with reason and formed for society?

EUNOMUS.

Your imagination must descend a little from these very high flights before I can expect to convince your reason or clear your doubts. I am glad, however, to see the effects of our last conference in the restoration of Plato to your esteem, whom I never thought
to

to have heard mentioned so honourably, from your temper at that time. I must hope too, that you will not expect me to answer all those questions in one breath, as you have proposed them. To do them justice, I must handle them distinctly.

You seem to me to have thought it a necessary qualification for your profession to be ready to take either side of a question, to argue: I can scarce otherwise account for the singularity of your conduct on this occasion, in chusing to set out in viewing every thing on the wrong side. I might for that reason begin, by reminding you, that every one ought to have a good opinion of his own Profession; at least let the good and the bad be weighed together. I may venture to affirm in this case, the light and shade will form a juster portrait and a more pleasing picture.

picture. This I should have more largely insisted on, if I had not some suspicions, that the choice of the wrong side of the question was at bottom directed by farther views than that of opening a field of argument; and was in reality intended to echo the objections of the world; and after a fair controversy, if possible, to silence them. At least I will do you the justice to say, you have many on your side: and as error defended by example, may pass for truth, it will be better worth while to strip it of its disguise.

§. 3. One observation, however, seems to be entirely your own; it is not certainly the voice of the multitude: and tho' it carries with it the air of scholarship, does not seem so well supported by good sense, by which I would ever wish to see learning distinguished. Your objection, I think, to
state

state it fairly, is not so much that the laws are published, and practice carried on in our native tongue, but that other languages are intermixed with it; and thence you seem to argue, that if our own tongue is not sufficient for the purpose, rather make use of any other that is, than introduce such a confusion by variety.

POLICRITES.

You have stated my objection in terms; but before you answer it, see what I have to say in aid of it. I am not speaking against an Act of Parliament: it is sufficient for the world, that the English language has gained possession by law. The reasons for making and for continuing the law, it is my duty to suppose, exist at this day, as the law itself does: I only ask what those reasons are? Why has not
the

the English language a more universal dominion, in exclusion even of terms of art, barbarous in this view and absurd. If the English language is not adequate to every purpose, the Latin is : at least our ancestors, in the universal use of it, were not so wise as I am willing to esteem them. 1. It is evident that for many centuries, the Latin language was almost the general vehicle of the sense of the nation in Records, Acts of Parliament, and even in private Deeds : and without going back to the Saxon period, Last-Wills themselves were penned in this language.

2. That the Latin language (for the French, as a living one, was, tho' much used, always liable to some of my objections) has been employed, not only by our own, but by all civilized nations in their Law proceedings.

3. It can scarce, from so constant a use of it, be said to be unnatural, tho' a dead language: nor is it, as such, peculiarly unintelligible: and tho' you was pleased to say my objection was not the voice of the multitude, who, to be sure, would not give up their own language, yet, I believe, the multitude are as much strangers to the subject, tho' it is in their own language, as if it was in a Latin. But now in the mean time, how did the multitude do from the Conquest till Q. Elizabeth's time? Practice, perhaps, began to indulge them with the free use of their own Language at that time; but the Law did not interpose in their favour till the other day. The subject then, I conclude, not the language, is to be blamed as unintelligible.

4. But

4. But if the people had no real disadvantage from their ignorance of a “dead Language,” I am sure they had real advantages in its certainty and conciseness, which they in vain expect from a living one. Our own in particular has, in this respect, been found to be immoderately prolix and equivocal. Why? But because every man, with scarce learning enough to have entitled himself to clergy in former times, is master of his own Language enough to make him think he can draw pleadings and conveyances. And why, tho’ he uses every word in the Language, when one alone would have expressed his meaning, or have answered the purpose, is it still liable to perpetual dispute; but because a living Language must always be most open to subterfuge, equivocation and reserve? In proof of this assertion, I shall

shall barely appeal to our modern wills, settlements, and pleadings, compared with those of our ancestors; which are equally exceeded in length, and in being subject to dispute.

5. One argument I shall sum up all in, that the profession has at least a chance of being more liberal in that view than in this. Dictionaries and abridgements will not then have the chief hand in making some Lawyers; and the Profession by being more learned will become more liberal: for tho' I do not insinuate, that purity of practice, which is essential to the liberality of a profession, is a necessary consequence of greater knowledge; yet, upon the whole, it is a more probable consequence than otherwise. Thus you have my reasons for the objection; I will rather presume upon your memory, than tire your patience
in

in recapitulating; and will not affect perorations, where I would not wish to persuade.

EUNOMUS.

Perhaps you will disclaim affecting the art of the disputant, as you have done that of the orator: and yet, I know not how, you have been tempted to mislead by fallacy, and to mistake the shadow of truth, for truth itself. Do not think I mean to laugh at your arguments, instead of answering them, when I profess myself surprised that you, who on all occasions, I know, are as much an advocate for the muses, as you appear to be for the Latin Language on this occasion, do not insist, that all our Laws and Law-Proceedings ought to be in verse. Bad verse would be as tolerable as bad Latin; the difficulties and delays of pleading

would not be much greater in this respect than they were before; they would be in a few learned hands, as they were when Proceedings were in Latin. And as practice is the capital argument to recommend one absurdity, I do not think it would be wholly deficient in this. I might, as you have done, mention with triumph, that not only Records, but Charters and Wills have been written in verse; Embassies have been delivered in verse; Histories have often been penned in metre: nay, as verse is agreed to have been the original form of all writing, why should not all kinds of writing still appear now and then in this form, as well as in plain prose. It is clear we have antiquity to countenance even this absurdity. Aristotle tells you, the Agathyrsi had all their Laws in verse; and Tacitus, that the Germans had no
annals

annals but what were so : and your
 own country Druids, were both Poets
 and Lawgivers ; “ Magnum numerum
 “ versuum ediscere dicuntur,” says
 Cæsar : you know they rarely com-
 mitted any thing sacred to writing, or
 else undoubtedly they would have left
 their mysteries in verse. This way
 of talking would have been a sufficient
 answer to your argument, deduced
 from mere practice and example, if
 you had not urged the antiquity and
 extent of the practice in this respect,
 as presumptive evidence of its being
 reasonable. I am now, therefore, to
 encounter the argument in a more se-
 rious manner. And the first thing I
 must take notice of is, that what “ you
 “ was pleased to sum up all in,” might,
 without any prejudice to your cause,
 have been entirely omitted. We are
 of one mind in our wishes, as to the

liberality of the Profession ; but I must differ from you, in thinking that important point is at all concerned in the present question. I agree with you in allowing the Profession has a fairer chance of being more liberal, as it is more learned : and, I believe, the fact will bear me out in saying, the Professors of the Law were never more generally learned, than they are at this time. It is much owing, no doubt, to the education of the times ; when the University is made the almost constant step to the Bar. And it is with the utmost pleasure, in this view, that I recollect the late noble regulation of our Law-societies, so commendably unanimous in promoting this plan of study ; that when themselves have been styled of old “ Universities ;” and certainly are, in their nature, a noble model of Academical Institution, for
the

the single purpose of studying Municipal Law; they have yet paid that just respect to the Universities where science ranges at large; have considered how necessary the elements of other parts of learning, taught to any purpose in those places alone, are, towards forming a Lawyer properly so called, that they have allowed the time spent in College, to make up part of the limited standing for the Bar: and have by those means, I hope, made what had before been too much a by-path to the Profession, the public road to Westminster-Hall. But as Westminster-Hall itself is a publick road for the whole Kingdom; and the greatest part of those who are obliged to travel it, have never been at the University, what obstacles would you throw in your Clients way, by making them hear their Cases disputed in an unknown tongue?

tongue ? by making them pay for having all their concerns translated into Latin, and after all, have Judgment against them, merely because your Latin is bad ? because you have expressed them in words not to be understood ; when, in reality, there are no words in the Language to express them in ? or to avoid the risk of a probable inconvenience, run into a certain one much greater, by swelling the Record with an *anglicé* in every sentence, as the constant practice was, because the furniture of a kitchen or a shop (for instance) cannot be intelligibly rendered into Latin ?

I must allow, the obscurity of Law Proceedings will subsist to every body but Lawyers, was it entirely in an English dress. And this will be a vindication of its not being so ; but still making use of an intermixture of Latin
and

and Norman words. That obscurity is owing no doubt to the use of technical terms : and any one in England, not conversant in Law Proceedings, would, I believe, no more understand Sir Thomas More's question, put into English, than the Sophist at Brussels did, when it was in Latin. The anecdote is this : It seems, according to the humour of those times, public Theses were maintained in the University at Brussels, during which, a formidable disputant started up, who gave a challenge to all mankind ; and was ready to enter the lists on any question, in any art, or science. Sir Thomas (who was then part of the English Ambassador's retinue) accepted the challenge, and with great humour stated a question, the very terms of which, he was sure, none but an Englishman, and a Lawyer, could understand ;

stand : two great chances on his side ! it was *An averia capta in withernamiâ sint irreplegibilia* ? That is, “ whether “ beasts taken in withernam are irre- “ pleviable ? ” — for my argument will not lose by translating it. A knowledge of the Language, it is plain, would not lead to a knowledge of the question. The consequence was ; the Sophist was struck dumb, and the whole City, we are told, were happy in having his arrogance so artfully defeated. Apply this story to our present subject : it is not the dead or the living Language in either case, but the technical terms that occasion the obscurity. When a Mechanic speaks to me of the instruments and operations of his trade, I shall be as unlikely to comprehend him, as he would me in the Language of my Profession, tho’ we both of us spoke English all the while.

while. Is it wonderful then, if in systems of Law, and especially among the hasty recruits of commentators, you meet (to use Lord Coke's expression) with a whole army of words that can not defend themselves in a grammatical war? Technical Language, in all cases, is formed from the most intimate knowledge of any art. One word stands for a great many, as it is always to be resolved into many ideas by definitions. It is, therefore, unintelligible, because it is concise, and it is useful for the same reason.

Tho' what I have offered will be a sufficient reason for using our own Language as far as we can; and some-vindication for using foreign terms, where we can not: something may be said for that great harshness of style, which we must still be doomed to encounter

counter in our old Books, Records, and Acts of Parliament.

The barbarity of style then, in our old Books and Laws, arises, I conceive, from one or both of these causes.

1. Either from the use of words, ever unknown to the Language in which they are penned: or, 2. From the obsolescences of the Language. I do not see why either should at all reflect upon Law Proceedings, because they are both common to other compositions, in certain circumstances, as well as to Laws.

1. The obscurity arises from the use of such words as were before unknown to the Language; which is the case of many terms of art, that have an additional obscurity to that of their being confined to the art itself, and never applied in common life, in their being
often

often borrowed from the laws or usage of other countries, where the terms were, perhaps, proper and familiar. And this is the case where one nation learns any art or science, already established and grown up to maturity in another. It is what we have done as to Painting and Music from Italy, as to Philosophy from Greece and Rome, and as to Legal Terms, in many respects, from the Normans.

All then that can be done in any composition, to familiarise foreign terms, is to give them a termination suitable to the Language into which they are introduced. This is what our Laws, when written in Latin, have done to Norman and Saxon terms. This (as Sir W. Temple observes) is what the Romans themselves did, when they had occasion to import foreign names of places into their own Language.

Language. This Tully did, when he transplanted the Greek Philosophy to Rome; Xenophon, when he treated of Persian affairs; writers of the New Testament, in mentioning Roman places and customs: and, what is more to our purpose, when the Roman Law, on the removal of the Imperial Seat, was translated into Greek, Roman Terms of Art were chiefly preserved.

2. But the bare obsoleteness of Language, independent of Terms of Art, will alone make our Laws, or any ancient composition, unintelligible, barbarous and uncouth. It is the natural effect of time upon Language, as wrinkles are of age upon features. In Tully's days, the Laws of the Twelve Tables were become obsolete and obscure: and Quintillian tells us, the "Saliorum Carmina," were grown
mysterious

mysterious to the priests themselves, who repeated them. And it can scarce be a wonder, that the French of Edw. I. time, in our old Statute Books, is unintelligible to any but Lawyers, even in passages excluding Terms of Art, when Scripture itself, if it was to be read before a country congregation in the first translation of the Bible, would be as little understood, as if it was read in Greek. One can not help wishing, in this view, that both our Laws and our publick service of Religion had been earlier used to our own Language ; since, besides by these means they would both have been more universally understood and admired ; they would both at the same time have, in some measure, contributed to have fixed and preserved the Language.

And

And yet, how great soever the absurdity may seem, and how much soever to be lamented, that Laws which are made to be universally understood, have with us, for ages, been composed in Languages which, at most, none but learned men could understand, the fact itself does not seem difficult to account for.

During the unsettled times our country was long involved in, after the Conquest, the Language must necessarily have been in a fluctuating state. In the period preceding the Conquest, the various inundations of those Northern torrents, were enough to wash away the remains of the British Language. And the reason why the Norman and the Latin tongues were preferred to our own, for the purposes of Legislation, after the Conquest, seems to

to have been, that they were more settled, and, perhaps, almost as well known as what was left of the British.

1. As to the Latin, if you consider the intercourse our nation, for so long a time, had with the old Romans, and afterwards with the see of Rome; how the Canons and Constitutions of the Church were composed in that Language; and most probably publick worship at home; it will be easy to account for the use of that Language in respect to Laws. As to what you observed, that even deeds and private instruments were likewise in Latin, which seems more unaccountable; perhaps it might have been, because so great a part of the lands were in the possession of the Church, which consisted of men of learning, who might prefer this to a living one: especially

cially since the Statute of Edw. III. by which, as all Records were to be made up in Latin, it might be thought as well worth while to have them so at first; and then, in case they should be contested, less doubt could arise about the identity or meaning of the instruments in dispute. And 2. as to the use of the French, in conjunction with the Latin, and for a time, in exclusion of it, the continental connections, from the moment after the Conquest, would be alone sufficient to explain it, if we had not been told by historians, that the Conqueror used the utmost zeal and industry to propagate his own Norman tongue: and that too, in his particular case, from motives of sound policy and good sense.

These reasons, I think, may give light into a measure so seemingly repugnant

pugnant to general principles of policy, considered independent of our history; but I own to you, I am greatly surpris'd, that from the time of Edw. III. when the Parliament so nobly checked the usurped dominion of the bastard French (as the Norman Language has been called) in our Records, that no successful effort should have been made, or seemingly have been wished for, to restore the Laws and all Legal Proceedings, to the general Language of the Country, from the reign of Ed. III. to the beginning of the late reign; except the momentary usurpation of good sense, (as I may call it) in one of Cromwell's ordinances to this purpose: an ordinance founded on just notions, well considered at the time, and fit to have been retained in after-times. Pity indeed that the Language should have been, in any degree, sent into exile,

just at the time when the legal Government was restored!

POLICRITES.

To tell you the truth, I have other objections to the style and phrase of our Profession, than what result merely from the use of the native or any other Language in its Proceedings. We are every day enlarging a collection of cant phrases, which can scarce be called Terms of Art, or, at least, are many of them of so modern a growth, that the absurdity is, in a great measure, that of these times, and I do not know where it will end. Such are your “springing, shifting, and resulting Uses,” “Executory Devises, Contingent and “Cross Remainders,” and many others less authorised that would confound Lord Coke himself: not to mention your use of fictions, in contradiction to the

the common sense of the World,—that the King never dies,—that the Term is one day, and such like. If these were introduced only for the love of mystery, or to amaze men with paradoxes, I could soon increase your collection. In the same equivocal sense, one might say with Swinburn, a mother is no kin to her child; or that there is at this day, no such thing as a religious man, or, indeed, as a villain in England. These Jeu d'Esprits would be full as manly as making “homo” stand for a woman, or mulier for a man, persons to be born to mean persons already born, persons living to mean those not born, a King to stand for a Queen, and even one particle to mean another.” But not to mention more of these, for these are trifles to much of the Language of special Pleading, so little known to any but

the Professors themselves, that many would as soon expect to get its meaning by conjuration, as that Patriarch of Venice once attempted by a word of Aristotle's.

E U N O M U S.

Several strokes of raillery you have aimed at the Profession, put me in mind of an anecdote I have met with in a book of travels; tho', I am sure you do not mean to say so much. The story is not an unpleasant one, tho' you will own rather severe. St. Evona, a famous Lawyer of this Country, in the days of our early ancestors, was piqued, we are told, for the honour of the Robe, that his Profession should have no Saint to patronize it, when almost every other employment had some pious person, whose memory every one of the same way of life might

might revere, and under whose good auspices they might follow the same track. The Physicians, he knew, had St. Luke; the Champions had secured St. George to themselves; and Music and Painting were not without their Tutelar Saint: but the Lawyers he found had none. The Pope, he was bound, as a good Catholic, to think could help him out in this emergency; so to Rome the good old man went: and requested his Holiness to give the Lawyers of Britain a Patron. The Pope was not displeased with the request; but puzzled how to grant it. The truth was, however the Roman Calendar was stuffed at that, or in later times, he could recollect no Saint who was not already disposed of to other Professions. What could his Holiness do? The dilemma was distressing enough. Had he flatly told the old

man, he could not assist him ; the Pope would have owned then, what no Pope ever yet owned, his Incapacity : had he taken the other side of the alternative, and offered him a Saint for his Profession, who had already long been at the head of another ; his Holiness foresaw our veteran Lawyer would have disputed with him the validity of a subsequent grant of the same thing, while a former was still in force elsewhere. Pressed by this difficulty, his Holiness acted like a good casuist : and thought of an expedient that might at once be a salvo jure of his good nature, his want of recollection, and the Papal power. He proposed to St. Evona, that he should go round the church of St. John de Lateran, blindfold, and after he had said so many Ave-Maria's, that the first Saint he laid hold of should be his Patron : which the good
old

old Lawyer willingly undertook.— When he had finished his Ave-Maria's, (the Book says) he stopped short, laid his hands on the first image he came to, and cried out with Joy, “ this is our Saint, let this be our “ Patron.” But when the bandage was taken from his eyes, what was his astonishment to find, that tho' he had stopped at St. Michael's altar, he had all the while laid hold, not of St. Michael, but of the Figure under St. Michael's feet ! The story says, he was so dejected at the disappointment, that he died soon after. And it seems to me still open for you to argue, whether Evona himself had any authority to act for his Profession ? And whether he should be deemed to have ever accepted the Patron ?

POLICRITES.

I shall scarce ever make a question of what I can never suppose. The Profession may safely disclaim such a Patron; I trust none of its members are bad enough to merit the imputation. But, if you would wish to answer my difficulties rather than desert me, with me it has always been difficult to understand, how Pleading is necessarily involved with such barbarous terms; and yet the art itself, so fenced by this inaccessible jargon, is dignified by nothing less than the name of science? Tho' I must not forget the Conveyancers, both artists often contributing to the glorious uncertainty of the Law. I do not know whether the blunders of the latter do not furnish the other with the best half of his business: “ words of limitation and
“ words

“ words of purchase,” it must be owned, have been very good Clients in Westminster-Hall ; their pretensions are generally left so very vague and ill-defined, that one rarely knows in favour of which to decide. However, the Pleaders are obliged to them.

EUNOMUS.

They are very little obliged to you, I think, for so partial and unfair a representation. But instead of a flat denial, of all you have said, in common form, I am ready in contesting a point that has been so often perverted, fairly to take issue, and in the Language of those gentlemen, “ to put myself on
“ my Country.”

POLICRITES.

“ I do so likewise.” But that you may not shorten your defence for want
I of

of a charge, I here declare, that I, and every man in England, do complain ; that whereas, we are true, pious, faithful, and honest subjects of this kingdom ; those dealers in form, do insert both for and against us so many false, scandalous, words, without a meaning, and with senseless repetitions to the damage of the said persons, very often of all they are worth. This is my *declaration* ; and I give you leave beforehand, to plead as many several pleas to it as you will : for, I think, out of all together, you will scarce patch up a defence.

E U N O M U S.

You have expressed yourself rather in the style of an impeachment than a declaration, especially as all the people of England are made parties to your complaint. And yet I do not at
all

all doubt, what you have probably condemned without much thinking, you will have candour enough to admire upon more solid reflection.

I observe your raillery, in the course of our conversation, has been often pointed at forms of Law : and special Pleading has, as it necessarily must have in that view, enjoyed a great share of that raillery, as you look on form to be of its essence. But because I aim at a more general defence, I will drop that particular for a few moments, after reminding you, that one of its ablest advocates is not blind to any real defects that have crept into it. Lord Coke himself often censures impertinent pleading. These censures do give some little weight to your complaint ; especially as in these enlightened days, there has been even an address

I

drefs in Parliament againſt ſpecial Pleading itſelf.

Forms in Pleading, of ſome kind, neceſſarily ſucceeded the old way of defence, that was made *ore tenus* at the Bar. In that caſe, the parties could beſt explain the nature and meaning of their defence; and the Court, in preſence of the parties, could ſay, whether that defence ought to be allowed. That method of pleading perſonally at the Bar, is ſtill retained, in a few inſtances; in the manner of ſuffering a common recovery, in counting on a Writ at a Serjeant's call, and in pleading to Indictments for crimes; and in Courts of Conſcience, for the recovery of ſmall debts. And though, in the general run of Civil Suits, it may, without examination, be thought the only remedy for diſpatch of juſtice; it muſt, in moſt caſes, and in an advanced

vanced State of Society, prove a great hindrance and disadvantage to the Suitors in other respects. For that reason, it will be rarely found to continue in causes of value, in any civilised country whatever. The instances of this kind, one reads of in the Turkish dominions, may please us that it is scarce to be met with elsewhere. The opposite practice, in most countries in Europe, and the elaborate forms, appropriated to particular cases, among the Greeks and Romans, shew the sense mankind have of the necessity of written forms of proceeding in the due administration of Civil Justice. Nobody, I imagine, every thing fairly considered, would wish to have this method of personal Pleading, recalled in England. And yet, it is very plain, some kind of form immediately came in the room of this manner of defence, as a means of checking

checking the impertinence, and expence of telling long stories on Record, and of obtaining some kind of certainty in the grounds and meaning of the charge and defence set up. You will best understand what kind of forms are real and necessary, by considering the nature of the certainty the Law requires. This, I mentioned, will oblige me to depart a moment from the particular subject now under consideration.

It will appear, I apprehend, incontestibly clear throughout our books, that the Law requires less nicety and exactness in a man's last Will, than in a Conveyance : and less in a Conveyance than in Legal Proceedings. The reason of which I take to be ; that at the time of making a Will, the parties understanding is sometimes presumed to be impaired, and they are obliged
to

to act without proper assistance. And therefore, where there is power to come at the intention, Courts will do every thing they can to enforce it: because a person in his Will disposes of what is merely his own absolute exclusive property; or so far only as it is so. But in Deeds (which are solemn acts executed inter vivos) the Law will require a sufficient exactness; and legal powers to be expressed in proper legal phrase. Because they are supposed to be framed by the advice of Council: and it is necessary, if technical terms are made use of, to understand them in a fixed sense; it is necessary too, for the credit of the Law, in order to avoid bad precedents, to overturn such Deeds, as when contested appear to be informal and uncertain. But even here "*Apices Juris non sunt Jura*;" and Courts will not permit trifling

trifling Exceptions to avoid Deeds, because the party has no remedy to have new. With more reason, greater precision was of old required in Writs, and still more in Pleadings. For Writs, if abated, may be supplied by new Writs; and for the credit of the Law, what is likely to become immutable as a Record; and as such, of that dignity as in point of obligation and interest to the parties, to take place of all instruments whatever; in point of precedent, to silence all mankind, ought in reason to be more exact than all other forms whatever.

But even in Legal Proceedings, tho' they are, or are likely to become Records, Courts will distinguish between matters of an amicable, and an adversary nature; and will make some grains of allowance to the former, that they will refuse to the latter. Lord Coke,
I think,

I think, has told us, that they will not “ pry with Eagles eyes into assurances of the Realm ;” that fines shall have such construction as Charters, or other Conveyances, between party and party ; and need not have such a precise form as a Writ or a Judgment. From the same just principle of reasoning, is derived that stream of indulgence, that flows in the capacious channel of those statutes made to remove exceptions to pleadings, for want of form, where the want of form could be no possible prejudice to the matter in question.

After this short, but necessary digression, to shew what certainty the Law does, in general, require ; I must now return to consider the particular kind of forms you, with a great part of the world on your side, have so freely censured.

I shall be always happy in endeavouring to vindicate any part of the English Law, which I adore, from any plausible imputations : and if it is really vulnerable in any part, perhaps it is principally in that you have now attacked. The few writers on Pleading, have never failed of making that passage of our master Littleton, to which you alluded, the motto of their performance : they with him, in their preface, call it a *Science* ; but in their works (I allow) have either forgotten to treat it as such, or have most miserably mistaken the nature of science. I do consider it as a science ; and in vindication of Littleton's notion, so grossly perverted, will give you my reasons why I think it so : but as your objection itself may be extended to other parts of our Law ; I shall go rather further in my answer ;
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by supposing, in order to prevent, such objections.

I shall take it for granted, that science and demonstration (which is the path to science) are not confined to mathematical learning only. They are to be found, wherever certainty in our ideas are: they are, therefore, to be had often in the study of Morality, and consequently in Law, which is founded on Morality. Demonstrations in Morality are not, in every instance, so absolute as in Geometry; because this depends on external figures, unalterable in their nature, and independent of the mind: whereas, the other depending on the mind, must depend on the clearness and precision of our ideas; which must be communicated by words, but will as often be entangled by them. Nor, when I speak of Morality or Law, as a science, can

I be understood to mean, that all the truths they contain are so chained and connected together, as to be deduced from a single proposition, like those of Euclid: that is not necessary to Science. Morality has been so treated, you will remember, but by no means to its advantage. A chain of propositions is as disgusting on such subjects, as the forms of Lemmata, Postulata, and Corollaries, so idly used on such occasions. And Leibnitz, who would have deduced all we know in a direct line from “*cogito ergo sum*,” was not, in my opinion, more ridiculous than these writers.

But Morality or Law are to be considered as *Sciences* in this respect: their principles are either self-evident truths, or immediately deducible from them; and we may reason in every case from those

those principles, with certainty, clearness, and precision.

Nor will it be any reply to what I have said, to ask me why, if Law is a science, does it at all admit of altercation; or is demonstration on one side set up against a pretended demonstration on the other, as in every case argued in Westminster-Hall? Why too, is truth itself engrafted on error? Why do Lawyers (as you have urged) use fictions themselves as principles; and instead of building on self-evident truths, argue from the clearest falsehoods?

The answer to both these objections, is briefly this; that they are both of them the common practice in other cases. But as to the first objection, the argument (if there is any) is drawn from the abuse, which, in sound Lo-

gic, you well know, concludes nothing against the thing itself.

1. In Morality as well as Law, interest will often get the better of reason : and men, who have a passion to indulge, or a right to dispute, will, when byassed by interest, endeavour to maintain their ground against truth ; and keep up a colour of argument, tho' they argue from false principles. But then in neither instance is sophistry to be complimented with the name of demonstration ; neither Morality nor Law are to be degraded, because they are abused. Besides, as men in either case, are accountable to other tribunals than their own consciences, a disinterested decision, in either case, will set every thing right in the end ; will separate truth from fallacy, and restore Science to its basis.

2. Your

2. Your other objection is more plausible, but proves too much. It proves, at least, that Lawyers may be excused in arguing from fictions, if in so doing they do no more than what Mathematicians themselves do. Those conversant in the higher Geometry, know what use are made of mere approximations, where the conclusions, though *ex vi termini*, not strictly true, are so near the truth, that they answer the same purpose. But to give an instance in Natural Philosophy, within every body's reach, do but, in *Prior's* Language,

————— cast your eye

At night upon a Winter's sky,

and then tell me, whether you see any of those bears, dogs, and serpents, so familiar to Astronomers? Every body sees the grossness of the fiction; and yet, you well know, how useful it is

to Astronomers. Will you, after these bold assumptions, rob the Lawyers of a few innocent fictions? Or impute as a crime to one science, what has so nobly extended the boundaries of others? But the Law itself, in reality, is not answerable for all its fictions: we must distinguish. Some, indeed, are of its own creation; but others are the effect of time alone. To explain myself by some of your own instances: *that all lands are held of the King — that the King never dies — that the Term is but one day — that Jamaica, or any other part of the world, is said, in a declaration, to be in the county of Middlesex* — are merely notions of Law, and of the genuine essence of fiction. But the terms *Benefit of Clergy — incurring Premunires — the doctrine of Common Recoveries and Casual Ejectors* — tho' fictions now, were once correct expressions;

pressions ; are founded on former real practice ; by course of time and accidents are greatly perverted from their original, but yet easily to be traced to a sound natural meaning.

If then, this answer to your objections is sufficient ; and the notion, that the Law in general is a Science, is right ; I will next consider, whether that branch of it that is conversant in pleading, has not the same pretension to science, that legal reasoning, in general, seems to have. And tho', on this occasion, I am counsel for Littleton, as well as the Law ; I desire Littleton himself may be heard : because I principally intend to shew the justness of his observation.

—“ Know, my son, (says this great
“ Sage in the book before us) it is one
“ of the most honourable, laudable,
“ and profitable things in our Law,
“ to

“ to have the science of well plead-
“ ing in Actions real and personal ;
“ and, therefore, I counsel thee espe-
“ cially to employ thy courage and
“ care to learn this.”

Littleton's words are, in point of expression, too plain to need any comment ; I will only enforce them, by observing, that the science he speaks of has, at this day, some additional recommendation to its “ being honour-
“ able and profitable,” that it is less troublesome than it was formerly : because, time has not only lopped off one of its branches, in the disuse of real actions ; but improvements in the Law itself, have weeded it of many of those quirks and chicanery that disgraced this part of the Law, more than any other ; and that so often in practice, set Littleton's epithets of “ honourable” and “ profitable,” at
variance

variance with each other. Witness the Statute of Q. Anne, for the amendment of the Law: and a hundred others allowing the general issue, and special matter to be given in evidence.

By pleading, I shall understand the entire structure of a Record: comprehending as well the Plaintiff's demand, suited to the nature of the action and the circumstances of his case, as the proper answer of the Defendant to destroy that demand; with the subsequent steps arising from these, till the Record is brought to some issue, either of Law or Fact.

Now with reason and common sense for your guides, would not you, in framing any demand at Law, consider what is to be alledged, and what can be proved? For in suing either for a right detained, or a wrong committed, the Plaintiff is to recover by his own strength,

strength, and not by the Defendant's weakness. And if, in point of prudence as well as justice, he ought to demand no more than he can prove; in point of general convenience he ought to demand it, with that certainty and precision, (as to time, place, persons, &c.) that the Defendant may know how to answer the demand; and a third person, an entire stranger to both, sitting in a Court of Justice, may know how to judge between them. This, I take it, is the essence of a *declaration* in the abstract: it is common to every form; and without which no form of a declaration is perfect. And tho' the wisdom of the Law, has invented different forms of Actions for the recovery of different Rights; you will find, that the substantial part of any declaration, is, as to its great outlines, what any person of good sense would
most

most probably put together in a demand of that nature.

POLICRITES.

But though declarations of Trover, Detinue, Trespass and Case, have each their proper forms ; why, if your position is true, cannot a plain, just narrative of the circumstances of fact, be sufficient of itself ; and the bare state of the case be its own form ?

EUNOMUS.

I can only answer, that this might do very well for the few who are endowed with uncommon good sense ; but is not the easiest and most direct way for the generality of people, who would never be able to tell their own story on Record, in a small compass. I will add, that forms, of some sort, are the
 3 consequence

consequence of any thing becoming an Art : what do we mean by an Art, but a collection of certain rules for doing any thing in a set form ? I will add too, that these forms are more concise and convenient in themselves, than any one general form can be. I beg you would remember, I am not shewing you the manner of pleading ; but that pleading is a science : nor shall I, in any one instance, pretend to tell you what ought or ought not to be pleaded ; but I am to maintain, that in any instance whatever, where the pleading is good, it is reducible to plain principles of common sense. This consideration, tho' it will not, in a moment, convey into your head all those forms, that nobody, I suppose, is born with, but acquires by long application and experience : yet will it teach you how to judge of those forms ; how to examine the propriety

priety of those exceptions, to be met with in our Report-books, and the opinions given in those cases; in short, it will prevent your being misled by form in opposition to common sense, or without ever consulting it.

The Defendants plea or answer to the declaration, (which, tho' only one part of this branch of learning, has by accident given name to the whole) is the most difficult and complicated part. It must be grounded as well on the case the Plaintiff makes, as his own: and therefore, in the simplest view, a Defendant must either except to the manner in which the Plaintiff makes his demand, or he must answer it. Again, in answering, he must deny the fact alledged against him, or justify the doing it. To shew you this idea is not a refinement of modern Theory, I will appeal to ancient

tient Rome. Tully, in his Milo, you remember, seems to have considered this as the only method of treating a charge—Vidit in confessionem facti, juris tamen defensionem suscipi posse—and again, Cum esset controversia nulla facti, juris tamen disceptationem esse voluit.

POLICRITES.

That a person, when he is charged with having done any thing, must either deny or justify the fact; I readily grant: but your modern way of doing both, puzzles me extremely to account for. And it will be as easy for you to quote Tully in vindication of that method, as to make it science. Euclid often sets out with supposing, that a proposition is true or not true: but he never supposes both. The conduct of your Pleaders in this case is, to me, worse

worse than the most perfect scepticism. I know nothing that resembles it, but Mr. Bayes's dance in the Rehearsal. First his troops are dead; then they are not dead; then it is doubtful whether they are dead or not. An absurdity this, in point, to any common case, (of an assault and battery for instance,) where a Defendant first says, he did not do the fact charged; then he says, that he did it in his own defence.

And then, tho' I should admit the necessity of different forms in declarations, I have much to object to what you, no doubt, will call words of course, such as colour, inducement, and all that kind of ingenuity with which Pleaders varnish over the flaws of their manufactures. Why, for instance, because I have reflected on a person's character, and am sued for it,

in an action for words, is he, at the very time he complains of such an injury, to do me (and what is more, to be authoris'd in point of form, to do me) a much greater injury in the same way? Why is he to represent me as one of a malicious, diabolical disposition, and intending totally to ruin him? Why, when another knows he ought only to alledge what he can prove, is it a necessary form for him to say, I beat him with sticks, knives, staves, and endangered his life; when, perhaps, if I did any thing, I only gave him a push? It is the doctrine of Pleading, that such things are not traversable, because immaterial: if they are immaterial, for that reason they ought not to be alledged. As for the giving colour to Pleadings; it is what has frightened some from the Profession itself; I need not add, it is enough
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to discredit the Profession in the opinion of others.

EUNOMUS.

I must again repeat, I neither proposed to teach the rules of Pleading, much less to vindicate the real imperfections, and abuse of it. It is not a reflection on the soil itself that weeds grow up with the fruit: it is on those who neglect its cultivation. Most of your objections are old, and carry with them the marks of decay, as well as of age. There is less room for them now than ever: at least, I will maintain, Pleading was never treated more as a science, than it now is from the Bench; and that in its consequence must make it be so at the Bar. The more strict the assay is likely to be, the purer will the coin be sent from the Mint. And in fact the special Pleaders are not

now the recluse beings that you supposed them, in the beginning of our conversation, “ people who furnish
“ the language of courts without ever
“ being seen there themselves ;” but many of them, men of the first abilities and most extensive practice ; who, if their inclinations or other engagements to the public would permit, might introduce their own science into the world in a manner that should satisfy every friend to solid learning, and silence every cavil and objection.

But as we are yet to look for any work of that kind upon this subject, I will endeavour to relieve you at present by observing, that as to the goodness of pleading, this science, like every other, has its axioms ; certain established maxims, which influence the whole, and with which all parts of the system must be consistent.

A Declaration, in general, we may venture to say, will be good, if the Demand itself is well grounded, the form of Action rightly chosen, and the circumstances of the Case expressed with sufficient clearness and certainty. A Plea, in general, will be good, if it is a certain Legal Answer to the Declaration.

To be more particular: the first fault in Pleadings is fatal; and the declaration is the ground of the whole. So that, if the demand itself is faulty, tho' the Plea is equally so, the Plaintiff must in reason be the loser: for no matter what is the weakness of a fortress to those who are still too weak to attack it.

To have the demand unexceptionable, there must be a legal right of action, and the proper course of remedy. The case must be expressed with

perspicuity and precision : and hence the necessity of many Counts or different ways of laying the case in a Declaration. Hence, too, matters of inducement are laid ; it is a general rule, these are not traversable, because they are not material to maintain the charge, but to inform the Court how the demand arose. For this reason, they need not be averred ; but every thing material to be answered, ought to be averred.

Then, as to the Plea, (considered, I mean, at present, as an answer, not as an exception, to the Declaration) it must be either a direct denial, or a direct excuse. Considered as a denial, it must not set out matters which do, in effect, amount to the general issue, but must set out the general issue itself ; for every body sees, the latter brings the Record to the very point at once, which,

which, after all, in the other case it may come to, tho', possibly, not till it has been swelled and entangled with Replications, Rejoinders and Surrejoinders. A Plea must not contain matter of argument or inference, but a positive assertion. It must not contain departures; or traverse what is not alleged in the Declaration. It must not be double, but rest on one simple point of defence. A Defendant, at this day, by leave of the Court where the Cause is depending, may plead several matters in his Defence, but not make a Plea double. The antient way, still used in many cases, to avoid duplicity in a Plea, is, first, to protest any matters charged are not true; and if true, by way of Plea, to justify. This form of Pleading admits, you see, of but one distinct issue; either upon a protestation or the Plea. After

all, when the contents of the Plea are settled, it must be right in its conclusion ; that is, in proceedings, by original writ, it must, as the case requires, conclude, either to the Writ or the Declaration : and in this sense only, I take it, is to be understood the maxim, that the conclusion defines the nature of the Plea. And in every case a Plea must conclude, either to the Court or the Country, as the matter contained in it is properly cognisable by the Court or a Jury ; and, therefore, tends towards a demurrer or an issue of fact. If I am not perfectly intelligible to you, or have been under mistakes myself in what I have advanced, as there is too much reason to fear, I hope the difficulty of the subject will excuse me.

The structure of a Record, raised on these foundations, is not less solid than the demonstration of a proposition in
Euclid :

Euclid : and Pleading, formed on these maxims, is not only matter of *science*, but, perhaps, affords some of the best specimens of strict, genuine Logic.

I know it is the want of adhering to these maxims, that will, after all, be urged by men of sense, as the great objection to special Pleading. A navigation, often difficult in itself, and always made dangerous by bad pilots, has made many wish that the course of the voyage was entirely changed ! This view, probably, induced the Legislature to authorise the general issue in many cases, and permit the special matter to be given in evidence. The same view, probably, occasioned an application to the Legislature, at the time one great reformation in the Law was made by putting Pleadings into English, to abolish, at one stroke, all special Pleading whatever. That part of the petition,

tion, we know, was barely left to stand on the Journals, and never was made part of the Law.

Others have wished to compass the same end, but to obtain it by different means : to have the advantage of the general issue in all cases ; but in all cases to have a note of the true point, meant to be insisted on at the trial, given to the other party or his attorney ; to have that very point found in terms by the Jury ; to have it endorsed on the Postea ; and Judgment given on the point. This method, it has been thought, would be sufficient to prevent surprize on either side ; would prevent, at the same time, all the inconveniences arising from the intricacies of Pleading, and yet make the Record particular enough, to set up one verdict, unimpeached, as a bar to another trial on the same case. I shall only observe, as
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to the method itself; that there is something analogous to it already subsisting in practice, in the case of an indictment for Barretry: which offence consisting of divers acts, in disturbance of the common peace, a general charge is allowed to be sufficient on the indictment; and in lieu of the particularity so favourable to the Defendant, and on that account, that he may not be surprised, so agreeable to the general policy of the Law, a note of the particular matters intended to be proved is given to the Defendant at a convenient distance of time before the trial.

But whether special Pleading would, in point of saving time or expence, be better reduced or not; or whether this method would be effectual or not, are points, about which, I take not upon me even to hint an opinion. I am content to insist, that Pleading is,
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in its own nature, a *Science*: and that in all cases, where the skill of the draughtsman itself is not deficient, the outlines may be truly and regularly drawn.

Thus, my Friend, have I presumed to vindicate this copious and difficult subject from those imputations, which I shall not scruple, now, to call, rather the cavils of prejudice, than the attacks of truth. If it really wanted defence, I am conscious, it must have looked for it elsewhere; I am too little versed in the excellencies of the art, to have set it in a fair and proper light; and yet too well affected to the Law in general, to suffer raillery to pass for argument, and the honours of a victory, to be assumed without even the merit of an engagement. Am I to infer, from your silence, that your attention is only wearied, or that your objections

jections are, at last, exhausted? However, I think it high time to know your mind, and I will call upon you in the words of the Poet.

— dede manus, si non accingere contrá.

POLICRITES.

§. 7. A compleat surrender, I fear, you must not expect; I am so far aware of your strength, that I think it good generalship to reserve my fire; and permit you to flatter yourself, that you have silenced the battery in that quarter, that I may open it with more success in another.

And besides, many of the objections, laying as strong against the forms of Conveyancing, as against those of Pleading, and which, therefore, I shall not repeat; the former has enough of its own, attended too with more fatal consequence in this case, than in
the

the other ; and of a more extensive, as well as more pernicious influence. Very few, in a society, (comparatively speaking) persecute their species, or are persecuted in Courts of Justice: consequently, few suffer by Nonuits, Demurrers, and Arrests of Judgment. But every one, in his turn, that has any property at all, buys or transfers an estate, marries and dies. And, therefore, every one in his turn, either in himself or his posterity, may be a victim to the Conveyancer : as he may be harrassed by his Deeds of Purchase, his Will, or his Settlements. And yet, here, I suppose, Practice is to be dignified, at least, with the name of an Art, as before it was called a Science : as I shall, doubtless, be told one has its Rules as well as the other its Principles. And one of its rules, no doubt, is to be as prolix, and full of
5 tautology

tautology as possible. The credit of which observation I, by no means, take to myself: it has been made, at least, a century ago; but, I suppose, does not lose strength at this day. One of our Legal Antiquarians, I remember, in a kind of funeral Eulogium on the Saxon simplicity, so long since dead, observed, that even in his time “*an acre of Land*” “*could not pass without almost an acre of Parchment.*” He would have observed at this day, that a flock of sheep is often converted into a Settlement. Virgil’s Carthaginian Queen was immoderate as well as fraudulent, in cutting the thongs into parchment, to inclose the purchase^a. Our moderns are rather more moderate, as they seem

^a Alluding to the tradition hinted at in these lines:

Mercatique solum facti de nomine Byrsam
Taurino quantum possent circumdare tergo.

Æn. I. v. 371.

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sometimes to bargain for no more land than they can cover with the uncut parchment that conveys it. If Somner, however, a grave antiquary, could indulge in the observation just mentioned, we may easily forgive the comic humour of the Poet, who makes Hamlet remark, “that the very Conveyances of a man’s Land would hardly lie in his coffin:” and if all this mass of verbosity shrinks, at last, to little or no meaning, I may well continue and apply the dialogue of Hamlet and Horatio, to our present subject.

HAM. Is not parchment made of sheep-skins?

HOR. Ay, my Lord, and of calve-skins too.

HAM. They are sheep and calves that seek out assurance in that.

E U N O M U S.

§. 8. I fear no human ties will give the “assurance” you seem to expect. In
vain

vain do we blame Civil Contracts for the want of a Security, which is scarce^d to be had from Laws themselves. The adequate compliance with a Law, or the performance of a Contract, must stand a little indebted to moral honesty; or the penalties will not protect the one, much less will the parchment the other. And tho', in many cases, there is no intention to evade either a Law or a Contract, there may yet be a difficulty to understand them; a difficulty in both, arising from the unavoidable ambiguity of Language: and in Conveyances, very often increased by the circumstances and condition of the Parties. Your objection, therefore, (to treat it seriously as you began) proves a great deal too much: it is, in some measure, founded on the imperfection of human nature; which, surely, will affect and perplex other

human Acts, as well as Conveyancing. But this unavoidable obscurity, which is imputed to Conveyancing as one defect, is, in reality, the cause and, I may say, the parent of the other: Deeds are, therefore, made prolix that they may not be obscure. The verbosity you complain of, arises from the anxiety of the Parties, that their meaning may be fully expressed; that as little as possible may be left to refine dconstruction; and no loop-hole for evasion. And thus, in the common comparison of words to the leaves of trees, tho' thick leaves do shade the fruit too much from the sun, yet they, at the same time, defend it from blights. I do not, however, pretend to insinuate, that the length of Conveyances, is not often unwarrantably licentious; I only mean to answer in general, what you object in general.

And it will strengthen this answer, as well as meet with another part of your objection, that flows from a comparison of the present age, with those far back, if we are a little more particular on this subject. The subject itself is indeed very extensive: and you did not greatly exaggerate, when you said, every body made a Purchase, a Will or a Settlement. As all property may be conveyed, it is evident modes of Conveyancing must depend on the nature and modes of Property, and are co-extensive with them. I will, therefore, very slightly, consider the subject in this order. First, I will attempt a short history and general sketch of Property in its several successive stages, comprehending some of its latest regulations by Law. I will next consider the alterations in Conveyances, depending on the state and alterations of Property.

perty. After which it will be necessary to deduce the alterations in Conveyancing, introduced by Law ; and, very shortly, to observe what are the now great prevailing modes of Conveyancing. Lastly, I shall enquire, whence arises the confusion in forms of Conveyancing. In going through all this, the least I can do to reward your patience, is to give you free liberty to interrupt me as often as you please, to start your objections, and make your replies.

POLICRITES.

I wish you may not repent of your concession : however, the vast tract of time you are about to comprehend will be my apology.

EUNOMUS.

I shall not scruple to set out so far in your favour as to take the subject

up no higher than the Conquest: and even for a long while after, we are too destitute of particulars to be at all nice in fixing dates or distinguishing periods. It is sufficiently evident upon the least recollection, and I will venture to assume it as an axiom, that for many ages, “ the property of the “ whole kingdom was comparatively “ very small in itself, and in very few “ hands.” The riches of the nation arose almost entirely within itself; and England, considered as a reservoir, was, with respect to its foreign engagements, rather emptied than supplied from other quarters: for Wars were attended rather with expence than plunder. And the other great external resource to a kingdom, that of Trade, for a long time did hardly exist. The Riches of this Country, at the times we allude to, arose principally from the

produce of its Land. And from the great and even disproportionate tracts of Moors, Heath, and uncultivated Land that we see even at this day, we may reasonably infer an infinitely greater formerly; when the Forests Laws prevailed and engrossed so much of the surface; when the rest of the surface was employed only according to the mean state of Agriculture in those days. And then in how few hands was even this property? The Church (comprehending the monasteries) we are told had about a third part of it; and the rest was parcelled out, according to the military idea of those times, among the great feudal Lords, who by their immense accumulation of property were only enabled to rebel against their Sovereign and impoverish their fellow-subjects: for the Public, comprehending the Bulk of the
People,

People, exclusive of the Church and the Nobility, were either Mechanics and Artisans, that from the nature of their trades and their tenure must have lived from hand to mouth ; or Feudal Tenants in the melancholy series of Vassalage down to perfect Villainage. Nothing can take off from the deformity of this prospect, but the faintness it acquires from the distance at which we now view it. If you would at once change the scene, and as it were contemplate day-light without observing those intermediate diminutions of shade by which it is gradually separated from darkness ; we must at least pass on to the reign of Henry VII. if not to that of Elizabeth, before we can have any comfortable view of the Arts, Commerce and Riches of the Kingdom. We shall then find a vast increase as well as a diffusion of Property : it was

then principally that England was connected with and began to be supplied from every part of the habitable globe: it was then that every individual was enabled by his own industry to acquire property, fixed in its nature, and free in its disposal. It is enough, in speaking to one not a Stranger to the Law and History of his Country, to refer, in proof of what I advance, to the great Construction on the Statute of Intails, the Dissolution of Monasteries, and the Statute of Wills. All these concurred to open a free Alienation of Property; as Commerce and the Discoveries which it produced, did to increase it. Not that, I think, the political basis was broad enough to raise the importance and riches of this Country to its just and full grandeur, till a greater increase of Commerce served to animate the Spirit of the Times; and
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at the same time that it increased the Riches of England, made the Riches of England in a manner those of the rest of Europe.

When from that time to the present you glance ever so lightly back on the abolition of the military tenures with all their train of services; the new species of Taxation that sprung up out of their ashes; the introduction of public funds that took its rise from the emergency of the public, and that in its consequence has produced, and will necessitate the continuance of other funds; tho' let me observe a wise minister to keep this flame alive now and then snuffs the wick instead of perpetually demanding oil; prudently reduces the debt in order to preserve the credit. Add likewise the establishment of the Bank and commercial companies; the ingenious, and to certain limits,

mits, useful substitution of paper currency for cash; the analogy that inland Bills have been made to bear to foreign Bills of Exchange in their negotiability and legal protection; and the coincidence of all these in forming a new species of property; when I say you have surveyed all these in your mind, you will have before you a sketch extensive enough for our present purpose, of the general State of Property; from whence you will collect, that it has been in the course of time more widely diffused, as well as prodigiously increased, as to the modes and quantity of it.

Its having subsisted in so many new modes, and its being so widely diffused, are circumstances that directly lead us to the consideration of Conveyancing. The forms used in early times, you will remember, were few and simple: for which it will be sufficient

ficient to have recourse to *West, Madox*, and some other compilers of ancient Precedents; tho' the Draughts in those Collections, I own, are on so small a Scale, that those of later ages will appear too large and disproportionate: but I leave you to your own reflections on that head, and will go on as I proposed.

§. 12. And in order to keep within moderate bounds on so large a subject, let us distinguish as well as define.

By Conveyances, I would be understood to mean at present, written Instruments of private Persons, disposing of Property. This seems the most extensive notion of the subject: it has on the other hand its own limits, and even those must be reduced in this Enquiry.

It is obvious from this definition, that there are numberless written Instruments

struments that by no means fall under the notion of Conveyances.—Such are Certificates, Rules or Orders of Courts, Writs and Commissions, and various other Public Acts. These are all written Instruments; but they are neither Instruments of private Persons, nor do they dispose of Property. There are likewise other written Instruments which are in part included in the definition; and have a necessary relation to Conveyances. They do dispose of Property, but they are not acts merely of private Persons. They are not therefore in the present notion Conveyances; nor indeed in legal parlance have they been deemed so, but are called “Assurances of the Realm.” They are Acts of Court as well as Acts of the Parties: or rather Acts of Court intended to supply the defects, strengthen the operation, and preserve the
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the memory of what are in their own nature mere Acts of the Party. Such are some private Acts of Parliament, Fines and Recoveries. All which it is sufficient only to mention ; their not being in themselves properly Conveyances will warrant our dismissing them at present.

By this definition too I would be understood to include a Devise or Will as species of Conveyances ; though I know in common propriety a Will and a Devise are not only with respect to the different nature of the property they dispose of distinguished from each other, but as acts that do not operate till he that made them ceases to exist, are always in treating regularly on such subjects opposed in a strict sense to Conveyances. But so general a view as we are about to take will not endure this precision. They
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are both written instruments of private persons disposing of Property, they are both therefore Conveyances within the very letter of the present definition.

§. 13. Change of Property seems very early to have been accompanied with some written evidence to substantiate the transfer. The superior use of written agreements to those made only by word of mouth arises from writing being in its nature better able to keep in the memory of the parties themselves the particulars of their agreements; and from its affording the best evidence for others to judge of the right of Property in case the claim should be contested; or where those who were privy to the making the agreement are not to be had.

No doubt of it the parole transfer was the original form of alienation;

as

as it is easy to suppose the notion of Property, and the variations incident to it, to have been much earlier than the date of letters. The purchase of Sarah's Burying-place, in the twenty-third chapter of Genesis, is a very early and beautiful instance of the simplicity of the primitive times. And the great weight our Saxon Ancestors attributed to simple livery is better known to us than their forms of Conveyances. To this day indeed, in many instances, the greatest interest in lands may be passed by mere livery and seisin. But those changes of Property are necessary objects of Conveyancing where there is nothing for a corporeal investiture to attach upon; or, in other words, and more artificial language, what "does not lie in livery" must lie in grant."

§. 14. Should you ask me concerning the nature of particular forms, as well as of the several kinds of Conveyances, their history and their origin; the dread of prolixity would make me rather prefer the risk of being obscure to be sure of being concise. This consideration makes me gladly pass over the general or accidental structure of the deeds I am after to mention; with the various forms of dating, executing, and attesting.

I sat out with observing, that the alterations of forms in Conveyancing have depended much on the various alterations of Property itself: but alterations of the modes of Conveyancing have been introduced independent of new modes of Property: and this either 1st by Laws introducing new forms — as Bargain and Sale enrolled — Covenants to stand seized to uses

tises—Assignments under the Bankrupt Laws, &c. or 2. by Laws requiring new circumstances affecting forms that had a prior existence: such as the attestation of Wills—and the influence of Stamp Acts upon Conveyances in general.

§. 15. The forms of Conveyancing that prevail at this day are but few: but even these as to their origin I think stand in no very favourable light. For I shall not scruple to say, much of the Conveyancing now in force was originally the offspring of fraud and evasion.

A certain mixture of pride and indolence (the former being the consequence of riches having produced power; the latter employing power alone to increase the fund instead of the industry that first raised it), have in all times of our history made men

affect a fondness for *Perpetuities*; and labour with anxiety to introduce and protect them. And this will appear to have been the case, both as to individuals, who by means of great estates have necessarily been as great in power: and in bodies of men, who being possessed of great stock in common among one another have as naturally aimed at getting as much as they could into their own hands, and consequently taking it out of those of the Public. Had these attempts succeeded, you see by confining Property, the current of Conveyancing at length would have been stopped. And yet it is evident this art must have been ministerial for a time, tho' it was in consequence of the success of its service to have been discharged for ever. And this we shall find to be the truth.

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The individuals who have made the greatest efforts towards Perpetuities were the Feudal Barons of old. The Statute de donis in a manner created Perpetuities : for the books often speak of Estates Tail as they may by possibility last for ever. The Statute de donis Lord Coke expressly says, established a Perpetuity for all who had or would make it ; by force whereof (he adds) all the Estates in England were entailed. It was high time, you will say, when we come to reflect on the inconveniencies of such estates, that the Nation should be in some measure alarmed at the consequences, and check them in their birth. This they attempted to do it seems by divers bills brought into Parliament to restrain Estates Tail. But who could suppose the Barons (as it were by an Act of Suicide) would vote against themselves?

It is much easier to imagine, what Lord Coke tells us was the case, that these bills were always rejected. And in this manner Perpetuities continued for 200 years, till the Common Law in a manner was roused from its lethargy; and the Judges found that they could effect, by construction of a Law in being, what had in vain been attempted by particular Laws framed for the purpose. And in the ever memorable period of 12 Ed. 4, the Judges resolved, that by a Common Recovery the Estate Tail might be barred. Westminster-Hall has ever since maintained its ground, and routed even the most circuitous attempts to restrain Recoveries in favour of Alienations. This was the greatest effort that ever was made by individuals to introduce Perpetuities. The new-fangled doctrine
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of Trust-Terms has now and then furnished ingenious men with opportunities of contriving settlements that look'd this way; but the Courts have been always too much on their guard to let them prevail. And from the Will of the Duke of Norfolk, to that of the late famous Duke, however the subtilty of human wit has been exerted in this field of ingenuity; good policy so materially affected by it has always got the better in the end.

But the other species of Perpetuities I alluded to, aimed at by bodies of men, has not only been checked, but good has been made to arise out of evil. And that stream, which had it been suffered to be dammed up, would have deluged part of the Land, while it deserted the rest, by the Law providentially forcing it a channel, became the cause of general fertility. It

is to the attempts however of this latter kind that we owe much of our modern system of Conveyancing.

The alienations in Mortmain, Lord Coke shews, in the progress of its refinement, introduced leases for long terms of years : which till the time of Ed. I. were very short, and of no consideration. And it is in this view only that we can account for leasehold interests being so long incapable of giving the legal qualifications in various instances, they have since been allowed to impart. It is now every day's practice (however a plain man may laugh at it) for creatures, whose being is as a span, to talk in their writings "of a thousand years as of "one day."

The same views of Mortmain shewed the way to collusive fictitious Recoveries under a pretended title. It
was

was this armour, forged by fraud, that has in the hands of the Law been so powerfully turned against fraud itself; and been happily found, as I have mentioned, to be the effectual way of preventing the other kind of Perpetuity, tho' it was designed to strengthen the Perpetuities in Mortmain.

The same views of Mortmain too first devised Conveyances to uses. Those uses which afterwards grew up and spread so wide during the contest of the Houses of York and Lancaster; which were at length modelled by the famous Statute; and were the origin of our modern Jointures. From these uses likewise sprung the doctrine of Trusts; which at first (and in the Statute I speak of) were distinguished from uses in name only: and now are nothing more than uses not executed by the Statute, as Uses are Trusts

within them. The Statute mentions them both as synonymous: only as the provisions of the Statute were not co-extensive with the practice that had been connived at long before; such *Uses* as were not provided for by the Statute were left to their former channel of jurisdiction; and became distinguished by the name of *Trusts*. And these *Trusts* are still one of the principal objects, as they were originally the cause of establishing the great Court that has the exclusive cognizance of them.

The introduction and progress of *Uses*, besides being thus the means of forming a fair and solid union between Law and Conscience, in making the latter supply the rigour arising from the precision of the other, till both compleated the true line of Justice, and the real intention of the parties
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in their agreements, contributed very much in the end to the improvement of the Law itself. For the many successful attempts of disposing to a use in the party's life-time of all future profits of lands, when he could not dispose of the lands themselves by any act to be in force after his death, probably opened the way much easier to the introduction of Wills themselves: tho', as I have more than once hinted, the wealth and freedom of the times were sufficiently ripe for this mode of alienation, some time before it was established by Law.

From the premises I have now laid before you, it is not too much to conclude, what was assumed in the observation, that the spirit of innovation, and even of fraud, have in the end been the parents of public utility. And later times that have adopted these

these inventions as a regular part of their system, may even now commend the Authors, as the Rich Man in the Gospel *did his unjust Steward, because he acted wisely*; that is, because the policy of his conduct was in conformity to his principle, bad as his principle was in itself: but the prostitution of abilities to evade the Laws of one's Country, however ingenious and subtle the means are, no good man will even think of commending.

§. 16. After this excursion into the origin of so large a part of our present system, a minute detail of the lesser parts would be less excuseable; indeed the anecdotes themselves are few and thinly scattered in our books. It is said, if I recollect, that Executory Devises, for instance, came in about Queen Elizabeth's time: perhaps it is more correct to say the legal
I toleration

toleration of them began about that time; for tho' they have a small tendency to perpetuity, and are destitute of that certainty of Interest the Law has required in passing Estates; yet they had obtained in so many instances, and the real inconveniences were found comparatively so few to what the overturning so many Wills in opposition to this practice would have produced, that it seemed necessary to admit of them to a certain limited degree. Not but that this form, which an indulgent admission meant as a kind of boom cross a harbour, to preserve the vessels already lodged there, has by its dangerous structure in many instances, prevented others from ever arriving there, and has often overset the Testator's intention, it was contrived to preserve. Sir Orlando Brydgeman and Sir Francis North, we are told, were

were the Patrons and Founders of a very useful expedient in all Family Settlements, that of Trustees to *preserve contingent Remainders*. And the Books have handed down Sir Francis Moore, who flourished about the middle of King James's Reign, as the first practiser of a form of Conveyance, which has now almost absorbed every other as a substantive form, that of *Lease and Release*.

Particulars of this kind, if they could be traced with certainty, would neither be unentertaining nor perhaps useless in practice : they would at least be the means of giving due honour to the Authors of useful inventions ; and so far would be a valuable part of legal history.

§. 17. The present modes of Conveyancing that principally prevail, I said, were few ; I can recollect but
five

five at all in use. I mean the simple original Conveyances : the rest being either derivative or collateral ; or combinations of both kinds of Instruments in one Deed.

The Conveyances of the simple kind are Feoffment, Bargain and Sale, Grant, Lease, (to which we may add the Release, because it is, in fact, the principal mode of original Conveyances, tho' in its nature dependent on the Lease, but both Lease and Release taken together make but one Conveyance) and lastly, a Will or Devise.

By derivative Conveyances, I mean such as are strictly in their nature dependent on one of these principal original Conveyances ; and either defeat, confirm, alter, or enlarge the interest formerly passed by them. Of this kind are Deeds of Confirmation, Surrender, Revo-

Revocation, Defeasance, Assignment, and the like.

The complicated Conveyances of chief note, and which may occasionally comprehend by recital all others, are a Marriage Settlement and a Will. Indeed as they respect the two great periods in human affairs, in which the whole of a man's effects are necessarily brought within his contemplation; it is no wonder they are in themselves of a complex nature, as they must often exhibit a review of so many former acts concerning the disposition of his Property; and at the same time look forward so far as in a great measure to influence the state of it for the future.

By the former a man is as it were to endow the family, in prospect of forming which he is induced to marry.

By

D I A L O G U E II. III

By the latter he is in prospect of leaving this world, to provide for those he would substitute here in his room as to the enjoyment of his Property: and to make an entire and complete disposal of it. It is impossible not to recollect upon this occasion the excellent advice of Lord Coke, which therefore I need not repeat: was it followed, it would most likely prevent half the disputes that have arisen upon this subject.

Neither of these are Common Law Conveyances; and but of late years (within a century I think) come to that size we now see them; particularly the former, which of all others best warrants the severity of your ridicule.

For as to Wills, the Antients seem to have been not much less prolix than we are at present. I remember to have met with an old Greek Will of
Theo-

Theophrastus the Philosopher, curious indeed as to its preamble, attestation, and many other circumstances: but, at the same time, perhaps one of the strongest instances now remaining to justify the imputation of loquacity Tully has fixed on the Greeks.

§. 18. The confusion and uncertainty you complain of in Conveyances does not arise so much from length as from other circumstances. Principally I think, 1. from the use of ill-defined words, and affectation of unusual clauses. • The policy of the Law itself has in many cases, as well as in Conveyances, guarded against this uncertainty by requiring in some cases the insertion of the technical word that is to denote the particular act in contemplation; and by allowing in those cases no substitution of paraphrase or explanation. Thus in Indictments
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for particular crimes, the words Murder, Burglary, Rape, can be supplied by no circumlocution whatever. And thus in particular Conveyances, the words Exchange, Bargained, Sold, and Warrant, are equally necessary.

But the cases where this exactness is required are few ; and it is no balance for the want of exactness in other respects in those very cases. The defect arises from a higher source. Lord Coke was in his time aware of it, and has pointed out the cause, and thereby the remedy. He tells us, Conveyances and Wills are absurdly and intricately made, because they are intrusted to “Imperites.” And yet in his time, when the Law was so much a stranger to our language, Quacks in Pleading and Conveyancing could be but few in comparison.

2. But Conveyances and Wills have now and then, it must be owned, split upon another rock; when no ignorance of the Law could have been imputed to the makers of them, but on the contrary too much ingenuity; when they have attempted what the Law will not allow. As was the case of the Perpetuities, concerning which we have talked so much.

POLICRITES.

§. 19. And now you have once more mentioned them, let us have a word of the reasons for which the Law entertains this abhorrence of Perpetuities. What is there of such policy in the Law so anxiously restraining the natural wishes of mankind from doing by their own acts, what even the Law itself would in some measure do for them if it was left to the course and operation

operation of Law? The Law by a regular uninterrupted course of descent would transmit a Man's Estate down to his remotest heir at ever so great a distance: nay, a Man may grant his Estate to another and *his heirs for ever*. Or after all the various intermediate interests in an estate, created for thousands of years, or after vesting an estate by so many limitations in Tail, a Man may reserve the same estate to his own right heirs *for ever*? All this the Law confessedly allows: and what are views of Perpetuity, a common understanding would naturally ask, if these are not?

EUNOMUS.

You do not want to be informed, that tho' by descent an estate may be continued lineally to the heir of any given Proprietor to the remotest dis-

tance; or tho' the Proprietor may do that himself which (you say) the Law would do for him; or by parity of reason may upon good consideration convey as remote an interest to the heir of a stranger; yet in none of these cases, will the estate necessarily be so continued: nor indeed in the common course of things is it ever likely to reach any very remote period. When the Law continues an estate to a man by descent, the disposal of it by him is as free as the possession: and tho' the same descent would by notion of Law, and operation of the Grant, carry it down to his heirs for ever, he may the moment he is in possession defeat the hopes of all that come after him as to this estate. And when I give an estate to a man and his heirs for ever, his disposal of it to another is as free and open as mine was to him.

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It is the attempt to confine this disposal, to render an estate *perpetually unalienable*, or unalienable for a time, that the Law will not allow it to be tied up from alienation, that is the Perpetuity which the Law abhors. This, I said, would have been the consequence of a strict adherence to the Statute de donis, with regard to individuals; and of Gifts in Mortmain to Bodies Politic. This would in a less degree too have been the consequence of some modern subtleties in the moulding of Trust Terms. All these attempts therefore the Law has wisely defeated. The reasons of the abhorrence the Law has always had to them can never be a secret, if you do but consider, 1. That they are absolutely inconsistent with the temper of a free Government, by lodging too much power in a few individuals.

In the feudal times they had other inconveniencies which do not now subsist, such as depriving the Lords of their perquisites.

2. But more particularly, (because this inconvenience would be more soon and generally felt) they would be a bar to Industry and Commerce; the Cultivation of Land; and the Improvement of Estates: to which I need not say a freedom of charging or conveying Property is absolutely necessary.

§. 20. The Common Law then has a very just political abhorrence of Perpetuities, or any restraints of Property, that are unfit for the genius of a free and commercial Country.

POLICRITES.

May it not however be thought, that the freedom of alienation itself is in
some

some cases excessive; and that political views do, in some instances, stand in the light of moral duties?

It may be said, by the Power of making a Devise or Will, a person may leave his whole family destitute, and the Law cannot controul it. The Wife, it must be owned, is in this case better secured at all events than the Children; the provision of Dower at Common Law, where she has not barred it by accepting a Jointure before marriage, will controul any Devise whatever as an antecedent claim: but a Man may leave all he has from all or any of his Children, and his Children may be without remedy.

EUNOMUS.

The just answer to this barely possible inconvenience is, that in considerable fortunes, where the inconvenience

would pinch most, it will be less likely to happen, the Children being generally provided for by Settlement, besides the chance they have under a Will. And as to the power itself of disposing by Wills, it is what all countries in the world have ever adopted; and as Laws are not made against monsters, few States have supposed that Parents would be so unnatural as to make use of this power in prejudice to their Children, and therefore have made no provision against it. *Ad ea quæ frequentius accidunt, Jura adaptantur.*

And this reasoning will be an answer to another case, which may be more likely to happen, and that too perhaps without any bad intention of the Parents; and yet be equally severe in its consequences. This inconvenience may result from the mere act
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of the Law, even against the presumed intention of the Party. A man may die seized of an immense real estate, and perhaps hardly any personal estate, or at least not enough to discharge his debts: suppose that he leaves many children totally unprovided for by settlement, and that he dies intestate, the eldest son in that case, his heir at law, sweeps away his whole estate; his other children are, as the Law stands, not entitled to a farthing, and have nothing to rely on but the beneficence of their brother. This case in all its circumstances will rarely happen; the blame, when it does happen, must be laid in the first instance to the feudal course of descent, which, being once established, necessarily occasioned the possibility of this and other hardships, in all places where the customary power of devising was not preserved: it sub-
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verted that of the Common Law, which favoured an equal distribution. Many States indeed have invested primogeniture with a larger proportion, the feudal alone gave it an entire preference: and yet most writers have considered this preference as strictly in conformity to feudal principles, and necessary at a time when rules of landed property were to be calculated with a view to the military genius of the times; and when war was not, as in more civilized ages, carried on merely for the security of property. When the feudal system wore away by degrees, the power of disposing by Will was re-established: and that in most cases is a balance to the inconveniencies arising from the course of descent; especially if we take in the additional security most families have in the settlements made at the time they are first formed. This,
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in general, will be a match for the accidental omissions or inequalities of a Will; much more for the uncommon chance of an intestacy that is to operate merely on a real estate.

The Law then does not deserve to be arraigned either for its too great indulgence or restraint of alienation: and as to the uncertainty complained of in the forms of alienation, the cause of those defects has in some measure been pointed out.

§. 21. But as some kind of balance to the unavoidable as well as artificial uncertainty of language, the Courts of Justice have endeavoured by construction as much as possible to unite the intention of the parties with Rules of Law, and give them a joint operation. On this account (among other rules, which are so many as to exceed all recollection) 1. They will lean
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more

more to intention in a Devise than in a Deed, for reasons already given. And yet a Devise of Land in construction has been distinguished as much perhaps from a Will of personal estate on the one hand, as it has from a Deed on the other. The particular penning of the Acts of Hen. VIII. authorising Devises, the additional requisites prescribed by the Stat. Car. II. as to their execution; but above all, the consideration of the Statutes having introduced a new Law in this respect, have occasioned a Devise to be considered as an execution of a power which, like all other powers, must (tho' in a liberal view) be executed in pursuance of the authority from whence it is derived.

2. They will often take many different Deeds respecting one transaction all together in construction, and consider them

them as one Deed. In the same manner as in construction of an Act of Parliament, all other Acts made in *pari materiâ* are taken as one and the same system; or in the same manner as all the parts of any one Deed, or of any one Act of Parliament, in order to explain a particular clause.

3. Courts of Equity, and Courts of Law, will follow the same rules in construction of Devises: and Courts of Equity, tho' they have, as I said, the exclusive cognizance of Trusts, will follow the same rules in construction of the limitations of a Trust, as Courts of Law do in the construction of legal limitations of estate.

And when we have this security in these and other fundamental rules of construction, there is but little reason to exclaim against variety of seemingly discordant constructions on the penning
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of particular Conveyances, each affecting to distinguish itself by some peculiarity of cant or expression, which must ever be at the risque of a different (and most often a fatal) construction.

§. 22. But these considerations at best are a digression from our subject of Conveyancing. When the Draught is perfect, the Conveyancer has finished the arduous part of his business. The Agent must see it properly engrossed and executed: when executed, the parties themselves must take care to preserve it.

And as far as concerns the Artist, if we were to recapitulate in a few words, in the abstract nothing more seems necessary in this art than to know what “degree of property the
“ party is clearly possessed of; what
“ interest it is his intention to convey;
“ and if the intention is legal, how
“ to

“ to effectuate it by the best legal
 “ Form of Conveyance.” Taking
 care here, as was said, in Pleading, in
 the first place to chuse a form suited
 to the subject; and when chosen, to
 observe the necessary precision which
 that form requires.

POLICRITES.

§. 23. It would be rather a paradox
 to the rules of politeness, or of ho-
 nesty, to tell you, the reason of my
 not having kept my word with you is
 because you have kept yours so well
 with me, in giving me more satisfac-
 tion than I expected on the subject. I
 promise you I should not have spared
 any objections that had occurred to me
 on the foot of interruption; but you
 have in this part of your discourse not
 given me much opportunity. Another
 topic yet remains; as to which you
 will

will hardly be so fortunate, I mean what is commonly called "Practice of Courts:" by which I understand one mighty maze without any plan: where you may wander on without any guide to direct your steps, or any hopes of keeping the right path, if by chance you are once got into it.

E U N O M U S.

I will own to you, the knowledge of Practice can be acquired only by Practice; tho' as its rules depend on principles, it is as much a science as any other part of the Law is. It is impossible at present even to recollect those rules, and often difficult to investigate them. The very few books of any credit that have been written on this subject are written on a loose and unconnected plan; and after all speak only to the learned. This branch of

Law is more than any other destitute of any elementary treatise. Whoever affects acquaintance with it, is left both to teach and to perfect himself in it by experience; and must not expect from any thing hitherto communicated on this subject, to form an idea of it without a considerable attendance, and without making his own conclusions from a vast number of particulars. For the very few books about it are a mere common-place, distributed under some general titles, of use perhaps to Practisers themselves, but have no tendency to convey a knowledge of Practice. As I was led by these reflections to think upon this subject; and am satisfied the idea I had formed is a *new one*, so I am in some hopes it is not altogether inaccurate; and that it will place the thing

in rather a clearer and less disagreeable light than it has been hitherto seen in.

§. 24. In unfolding my idea of practice, I shall speak to you as I would to the world, was I to write upon the subject: in which situation I would suppose my Readers persons first setting out in the profession, who either from Lectures in their University, or their own private Studies, had a tolerable notion of the general principles of our Law, tho' they had not as yet, or had but barely, set a foot in Westminster-Hall; and consequently had as little idea of the Practice of a Court as is possible: it being pretty clear, I suppose, that no-body is born with knowledge of this kind; and perhaps as clear that no-body would desire ever to acquire it without the prospect of a lucrative application. This being premised, a great part of
what

what I have to say shall arise from the following case.

“ A Person (let us suppose) who
 “ has a Cause of Action, either in a
 “ Right detained, or an Injury done,
 “ is determined to bring his Action;
 “ and by his Attorney takes out Pro-
 “ cess against the Party complained
 “ of; in consequence of which the
 “ Party complained of (whom we
 “ call the Defendant) either puts in
 “ common or special Bail, as the
 “ case requires. The Defendant
 “ being thus secured, the Plaintiff
 “ declares, in proper form, the na-
 “ ture of his case. The Defendant
 “ answers this Declaration; and the
 “ Charge and Defence, by due course
 “ of Pleading, are brought to one or
 “ more plain simple Facts. These
 “ Facts arising out of the Pleadings,
 “ and thence called Issues, come next

“ to be tried by a Jury. The Jury
 “ having heard the Evidence upon
 “ the Issue before them, find (we will
 “ suppose) a verdict for the Plaintiff;
 “ on that verdict Judgment is after-
 “ wards entered. The Plaintiff’s Costs
 “ of Suit are then taxed by the Officer
 “ of the Court; and the Judgment
 “ is put in Execution by levying
 “ on the Defendant’s Effects, the
 “ Damages given by the Jury and the
 “ Costs allowed by the Court; which
 “ being done, there is an end of the
 “ Suit, and both Parties are once
 “ more out of Court.”

POLICRITES.

Short and clear indeed! But you
 forget that this view of a cause, with-
 out any interruption from the first Pro-
 cess to the Execution, compared with
 its real progress, is like the idea a
 traveller

traveller forms of a country beheld at a distance: mountains and villages appear much nearer than they really are; the several intermediate valleys and various inequalities of surface being overlooked in so extensive a prospect. And whoever thinks to see an end of a cause, in every case, by going regularly on without any delay from its commencement to its conclusion, proposes to travel as a bird does through the air. Design and accident may both stand in his way: and here, as in Mechanics, the whole motion which began in one direction may be deflected altogether into another.

EUNOMUS.

§. 25. The Practice of a Court in Civil Suits, I own to you arises 'almost entirely "from the interruption" in the regular stages and course of a cause.

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Those

Those regular stages (as to the time and manner of carrying them on) are themselves the legitimate offspring of the established Practice of the Court, where the cause is brought: when they are pursued, the course of the proceeding runs on smooth and silent, transacted by the Attornies in the cause and the Officers of the Court, without ever being heard of in open Court. The irregularities that push a cause out of its regular course must be redressed by the interposition of the Court: and it is this kind of business that furnishes and makes up a great part of the visible Practice of the Court in Term time.

§. 26. This idea of Practice will scarce be intelligible without going into particulars. I will do this with pleasure, because it will not only explain my notion more fully, but will
give

give me an opportunity of vindicating the Law from a very popular objection, arising (if any where) from this quarter, I mean “its delay.”

I need scarce premise, that the Application to a Court by Council is called a Motion; and that the order made by a Court on any Motion, when drawn into form by the Officer, is called a Rule.

In the case put, I said, the Attorney first takes out Process against the Defendant, in order to make him appear and put in bail. 1. The Process taken out may be irregular, and then it will produce *Motions to set it aside*. As for instance; where the Defendant is a privileged person. 2. It may not only be irregular, but highly oppressive; and then it grounds a *Motion for an Attachment* against the Parties executing the Process, as for a

constructive contempt of the Court. This is a general Motion, and may (as the oppression itself may) arise in any stage of the cause. The Suit itself, as well as the Process, may be irregular; and then it will occasion *a Motion to stay Proceedings in a Cause*, as either where the Parties have agreed to compromise the matters in difference, and a release is not executed; for the release when executed may be pleaded in bar of the action. The first Process may be regular, and the Bail may not; and then we hear of various Motions — either, 1. *To discharge the Defendant on Common Bail*, where it appears from the affidavit that he is not liable to give special bail; or where the affidavit to hold to bail is defective. 2. *To set aside a Judge's Order* made at his chambers relating to the bail. This kind of Motion
may

may be made on other grounds ; if the bail is regular in the manner of putting it in, but suspicious as to the circumstance of the bail ; the Plaintiff gives notice, and the Defendant *moves to justify bail* in open Court.

§. 27. Having done with the Bail, we will come to the Declaration ; and this will furnish several Motions as to the delivery of it—the frame and structure of it—or the neglect of it by the Defendant.

Perhaps it cannot be delivered in the common form, the party absconding to avoid it : and then the Plaintiff moves *that some other service of the Declaration may be sufficient*. The Declaration being delivered, the Defendant may apprehend it to be immoderately prolix and impertinent ; in which case he will *move to strike out some Counts in the Declaration* : the
Court

Court usually, upon this, order it to be referred to the Master of the Plea Office, and the Master's Report is the ground of the Rule afterwards made.

A Motion for the Master's Report, is another Motion that may arise in various parts of a cause, as I shall repeat.

In an action, that is in its nature transitory, if the Declaration lays the Cause of Action in one county, and it did in reality arise in another, the Defendant may avail himself of that circumstance; and upon Affidavit apply to the Court for the Plaintiff *to change the Venue*, that is, the place where the cause of action is declared to have happened, from the first county to the latter. The Venue may likewise be changed from any county in England, wherever the Cause of Action arose, to that of Middlesex, where the Court sits, if the Defendant is privileged as
attendant

attendant on that Court : or where the Jury, and not the Venue, is to be changed, as where the material evidence arises in the place laid ; but no Jury, common or special, can be had disinterested (as where it is a County-Cause about a Bridge, or the like) it is usual to *move for a trial in the adjoining county upon entering a Suggestion on the Roll.*

A Suggestion on the Roll is sometimes entered for other purposes ; as where the Sheriff, who regularly returns the Process, is partial : and this too even in the return of the Freeholder's Book for a Special Jury to be struck by the Officer of the Court ; in that case the Coroner must return the list ; and even where this precaution is neglected, a challenge may be taken to the array of a Special Jury at the trial.

If

If a Declaration is substantially defective, the Defendant, instead of answering, demurs to it. The exception he takes, is thereupon solemnly argued in Court; if allowed, the Defendant has final Judgment; if disallowed, there is Judgment against him to answer farther. If, on the other hand, the Declaration is delivered, and is unexceptionable, and the Defendant neglects to answer it in due time, the Plaintiff has his Judgment by Default; but if the Plaintiff is over hasty in signing this Judgment, the Court will interpose *on a Motion to set aside the Judgment*: in consequence of which, the Defendant will be at liberty to plead. The Motion to set aside a Judgment obtains in other instances; and the Motion for Judgment, as in case of a nonsuit, arises
on

on another ground : both which I will shew.

§. 28. When the Defendant comes to plead to the Declaration, instead of making in due time a plain denial of the charge, called the *general issue*, he may find it necessary to vary the common course, either by enlarging the time or the manner of pleading ; in which cases he will *move for time to plead* : which being a matter of indulgence, the Court upon the equity of the case may refuse or grant : and grant without or upon terms. At Common Law, you know, a Defendant could only plead one single matter ; which rigour often abridged the justice of his defence, and was doubtless one cause of perplexed inartificial pleading, the party endeavouring to crowd as much reason as he could into his plea, however intricate, repugnant
and

and contradictory he made it by so doing. The Legislature thought it necessary to remedy this great defect, and have enabled the Defendant, as it were, to open as many trenches against the enemy as the nature of his ground will permit. By these means the fort indeed is oftentimes rendered impregnable ; but sometimes the siege is only protracted. However, to drop our allegory and go on with the cause ; if the Defendant thinks more than one plea necessary, he *moves the Court for leave to plead several matters*, which he mentions. Sometimes this expedient is an after-thought, and then as it tends to delay the Plaintiff by putting him out of the beaten track, the Defendant *moves to withdraw the general Issue* and be at liberty to *plead specially* ; sometimes he moves the contrary.

§. 29. The Plea, Replication, Rejoinder, &c. if they are so lucky as to escape Demurrers, are at length quietly settled on Record, and come to that happy period called an Issue, which remains to be sent to a Jury: in order to which all the Record down to the Issue which it includes, is transcribed from what is called the Plea Roll, and which is only part of a large bundle comprehending the cases of a hundred other persons, and never stirs out of custody of the Court. That transcript is called the *Nisi Prius* Roll: as the *Nisi Prius* Roll, after it is returned from the trial, assumes the Name of the *Postea*; terms you will allow extremely significant when their origin is compared with their application, however barbarous when they stand by themselves: as awkward perhaps in the eye of prejudice, as a
foreigner

foreigner may appear to the vulgar of our own country ; and for no other reason but because his dress and manner are different from their own.

§. 30. Between the Issue and the Trial several Motions may happen which may either put off the trial or not. Of the latter kind, and at this stage, is a Motion by the Defendant for leave *to pay money into Court* ; which is an admission of so much being due, and nonsuits the Plaintiff if he does not prove at the trial that more is due than what the Defendant has so paid into Court. The same kind of application has been extended to goods of various kind in dispute ; but as to these the Court has been rather shy in granting the Rule, and has said more than once, “ that they “ do not keep a warehouse ; ” and indeed Westminster-Hall would hardly
be

be big enough for the purpose, if this kind of application was much indulged: besides, no Recovery in a Personal Action, except in that of detinue, is specific as to the thing itself, tho' it is as to the value; and consequently as the thing, when so returned, may be in a worse condition than when it was taken, the Plaintiff would be worse off by having it brought into Court, than if he had damages estimated according to the value of it at the time it was taken.

Many circumstances may make it necessary to postpone a trial, or vary the common forms of examination. The necessary witnesses in the cause may reside altogether abroad, or being there for a time, may not be likely to return at the regular time of the trial: in the first case the Court is moved for *a commission to examine witnesses on*

interrogatories; which interrogatories are settled here, sent over, and with their answers properly attested are sent back and read in evidence at the trial: in the latter case, the trial is delayed, on motion to *put it off for the absence of a material witness*. But suppose by this delay the other side are likely to lose evidence that is ready at the time, either in case a material witness is so old and infirm that he is not likely to survive the arrival of the evidence expected by the other party? or in case his necessary business, as a trading voyage or employment abroad, obliges him to leave England before the trial can come on?

POLICRITES.

That part of the delay you are now considering reminds me of an odd anecdote I have heard of this nature: a

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cause

cause of consequence was put off for some years during Queen Anne's Wars, on a motion from time to time to put it off, on the absence of the Duke of Marlborough, who was a material witness, and obliged by his post to be often backwards and forwards.

EUNOMUS.

In a case however far short of that, you will agree that the indulgence to one side in putting off the trial would produce an injury to the other; unless some provision was made on his part by way of equivalent: and therefore whenever that is the case, on the other side a *motion is made to examine such witness de bene esse*; the consequence of which is to admit the depositions so taken as evidence, if the person can not afterwards be examined in chief at the trial. What if a witness is under

none of these incapacities, but being duly summoned neglects to attend? his negligence ought not to prejudice the opposite side, tho' it does an injury to the side which summons him. The trial in that case then ought not to be put off as a mere matter of indifference. The other party has brought perhaps a waggon full of witnesses, has made out his briefs, and his briefs are delivered to Council: in that situation the other side must either go on with the trial and place his miscarriage to the absent witnesses account; or he must withdraw his Record, and pay the other side their expences for attending the trial. Hard he should do either, and the witness himself, the cause of the mischief, remain with impunity. The Law therefore gives two remedies against the witness in such a case—
1. Either to bring an Action upon the
I Statute

Statute to recover the penalty expressed in his summons ; or 2. The Law in vindication of the contempt itself has suffered by his neglect, will punish him criminally, on *a Motion for an Attachment.*

But we have hitherto been considering only parole or living evidence, as having an influence on the delay of a trial. The same must in many cases follow from written testimony. Thus for instance, among other particulars, we often hear of *Motions for leave to inspect and take Copies of Corporation Books ;* or of *Motions for an order to produce them at the Trial.*

§. 31. And not only the Witnesses in a Cause, but the Jury occasion particular applications to the Court : so does the nature of the Cause in question ; and so does the course of judicature itself. The nature of the Cause will some-

times require the Jury to see the very spot where the matter in dispute arises ; in which case, after Issue joined, the Court *is moved for a view*. The Cause is at other times either of that nature that it may exceed the apprehension, or be likely to inflame the passions of a common Jury ; in either case, *a Special Jury will be moved for*, composed of Gentlemen of superior understanding, and less liable to influence, than country people in general can be supposed to be. Sometimes the Cause is apparently likely to be very long, intricate, and important : important, I mean, both in its value and consequences ; circumstances which make it neither eligible to bring it on before a single Judge, or within the confined limits of an assize commission. Besides, it is very well known (so much does great modesty inseparably accompany

pany uncommon merit) that Judges of the greatest abilities have usually declined giving any decisive opinion on important points arising at the trial in the country : in consequence of which, what with all the train of expence and delay attending the argument of a Case or Special Verdict ; it is sometimes much better at once, all things considered, to bring the Jury and Witnesses up to town, and try your Cause before the whole Court. From these considerations arises a *Motion for a Trial at Bar* ; which being allowed, very often the points are determined, as they arise, by all the Judges of the Court, and satisfaction given to both parties : in which case the extraordinary expence of the trial is more than balanced perhaps by the consideration of its being most probably decisive.

§. 32. After having thus gone a little out of the way to put a case less common, let us once more return to the common case, and imagine the Cause brought to the Affizes, the Jury sworn, and the Witneffes (if you will) examined. The trial goes on, or it does not—if it goes on, either a verdict is given, or there is not—if a verdict is given, it is either given for the Plaintiff or for the Defendant. The Jury may be sworn, and the Witneffes may be in part examined, and yet the trial may stop; because the Parties may then, or at any time, compromise the matter in difference, or agree to refer it to arbitrators: in either case a rule is made at the affizes (called an order of Nisi Prius) and motion is afterwards made *to make the order of Nisi Prius a Rule of Court*. This is always done upon consent of
both

both sides, and is the best security of performing an agreement or an award; because it engages the best second in the world to fight with your antagonist, by making the injury done to you a contempt of the Court.

Well, but suppose the parties are as averse to a reference “as the widow “Blackacre in the play”,” the Cause then, it is plain, must go on: it may go on, and yet not get to a verdict; because if the Plaintiff does not prove his Case, the Defendant calls no evidence; and instead of a verdict on either side there is a nonsuit. Wherever a verdict is given, the Plaintiff at least must give evidence to maintain his Declaration: where evidence is produced on both sides, the verdict is given for the Plaintiff or Defendant,

* Wycherley's Plain Dealer.

according

according to the superior weight of evidence.

§. 33. Here closes the trial; and from this period it is that the Record assumes the name of the *Postea*; and if the trial is decisive, by neither the Law nor the Fact being afterwards controverted, the *Postea* is delivered by the proper Officer to the Attorney of the victorious Party to sign his Judgment: but in many cases after a verdict given, there is room to question its validity; in which cases the *Postea* remains in custody of the Court. The verdict may be exceptionable either from misdirection of a Judge in point of Law, or the misbehaviour of the Jury—in which case a motion may be made *to set it aside*, (as it may on other grounds)—or from a manifest imputation on their Judgment in its being clearly contrary to evidence; or in the damages

damages given greatly exceeding the injury sustained; in both which respects a *new trial may be moved for*: or if the verdict itself stands unimpeached, yet some original defect may appear on the face of the Record which shews no verdict ought to have been given, or though given no Judgment can be had on it: and when this happens, the motion is in *Arrest of Judgment*. Supposing the Verdict and Record to stand clear of all objections, the Judgment follows of course; and after Judgment, Execution. The purpose of which Execution is to levy the damages assessed by the Jury, and the costs allowed by the Court. The Execution however may for a short time be interrupted, in case any objection arises to the taxation of costs; and then a motion may be made for the Master to review his taxation. This
and

and every act of the Master being liable to be reviewed on appeal to the Court ; tho' in judging of ordinary stages of Practice, he is invested with original and competent jurisdiction : this Officer, both in his situation and employment, bearing no very remote analogy to the *Judex Pedaneus* of the Roman Law. The Execution may be suspended on other grounds ; the original party may die, in which case (where the action is not personal) a *scire facias* must be had against his executor : or sometimes, where the original party is still living, instead of an Execution had on the Judgment, an Action of Debt may be brought on it. That action, (unfavourable in the eye of the Law, because it is commonly the offspring of negligence and oppression,) may for instance be brought where an Execution against
the

the goods was preferred to that against the person, and it comes out from the return of the Sheriff that no goods are to be found. If the Sheriff in this respect returns a falsity in fact, or in point of Law by an illegal preference of one demand to another, he is liable to an action for such false return. But if he or his Officers misbehave in this kind of execution, or in any other service of a writ, they are liable to an Attachment; which, as I hinted, is a remedy the Court have always at hand to redress the oppression of their Officers in any stage of the proceeding: and it would be well if it was considered by them like the drawn sword of Damocles ever hanging from a slender hair, with the point just over their heads, and ready to fall upon them.

§. 34. When Execution is over, the Cause is over: and the Parties cannot well have a longer heat than in the course I have described. But a Cause may on many occasions come much sooner to an end; and in a direction very different from what has been mentioned.—It may come sooner to a trial—or it may come to execution without a trial. I will begin with the latter. In the case I put at setting out, and in the general exposition of the case, it has been supposed that the Defendant pleaded to the Declaration: but it was intimated, that if he neglected to plead, Judgment would be had against him by default. It was not so proper at that time to pursue the consequences of that measure: but now I must observe, that in consequence of the default of a plea, the truth of the fact is confessed, and
cannot

cannot be afterwards litigated as it is on a trial : but this Judgment, tho' it operates so as to preclude the Defendant from controverting the fact, which is the cause of action, does not go to a confession of the damages laid in the Declaration ; for a person may lay any damages in his Declaration, and is not at liberty to recover more than he does lay, even tho' he proves it on evidence ; because, perhaps, no parole proof shall prevail against his own admission on record. But with this liberty of laying damages to any amount, it would be manifestly unjust should he recover any more damages than he actually proves : that he should be permitted to form an imaginary scale of his own, and others be obliged to conform to its measure. And therefore in every case the actual proof of damages must ever precede the recovery

covery of them. In the case of a Judgment by default, instead of the common process and the regular formation of an issue, as in the common course, a writ of enquiry goes to the Sheriff, who summons a Jury for the purpose of ascertaining the damages : 'till this is done, the Judgment is called Interlocutory, in opposition to a final complete Judgment. In this course of proceeding other motions may arise—to *set aside the Judgment and Writ of Enquiry* issued thereon, as irregular—to *execute a Writ of Enquiry before a Judge* instead of the Sheriff, where it is a matter of importance—and sometimes for a *new Writ of Enquiry for excessive damages*, in the same manner as for a new trial on those grounds. When the Writ of Enquiry has been duly executed, then the cause comes out of this by-path, and goes on

on in the old road to the regular Judgment and Execution.

§. 35. There are two cases, however, where the admission of the Defendant silences all future enquiry either as to the truth of the fact, or the quantity of the damages: and consequently supercedes both a common trial and writs of enquiry—that of a direct “confession of the action”—and a warrant of Attorney to confess a Judgment: this latter occasions a motion very often; for where it is above a year standing, motion must be made *for leave to file the Warrant of Attorney* on affidavit of the Defendant being still alive and the debt unpaid.

When I said, just now, a matter may come sooner to a trial, I alluded to what is called an *issue directed* by the Court; which obtains in a Court of Law principally where a question

of civil right is involved in a criminal prosecution for a misdemeanor; in which case, it is the usual lenity of the Court to suspend the latter till the former has been tried: or where a Court of Equity directs facts to be enquired of at Law, and does not rest the case on depositions. And this manner of trying the fact, by directing an issue, has great advantages over a regular form of action: 1. In being better adapted to the real merits of the case. 2. In avoiding the delay and intricacy of Pleading. And it is in effect pretty near the method that I said had been proposed as a substitute for special pleading in all cases: for under the form of a wager, the real point between the parties is always brought into question.

§. 36. Thus have we, in a regular analysis of a civil suit, seen how a very
great

great part of the Practice of the Court in causes does arise. The general motions have been progressively pointed out in the natural order, tho' in the course of practice they must be made promiscuously : and tho' in this view they appear but few and simple, are yet capable of being infinitely diversified as to their objects.

After having so minutely traced the smallest fibres of this branch of practice, let us endeavour to consider practice itself as one whole ; and see what other divisions it is capable of, and which may assist in giving a general idea of it.

It is evident from the least recollection, that what has been said relates merely to the practice of the Court in civil suits ; and in general concerns the trial of a cause ; and therefore the former subject may be for a moment

resumed, in order (by way of giving a fuller general idea of practice) to establish a distinction between such motions as are in their nature *previous* to the trial itself, or *subsequent* to it. Of the former sort are motions — to stay proceedings in a cause — all motions relating to bail — all relating to declarations — to the time and manner of pleading — for changing venues — special juries, and many others we have just considered. Of the latter sort necessarily are motions to set aside verdicts — for new trials — in arrest of judgment — motions concerning writs of enquiry, and others that are easily classed according to this division from what has now passed. There are some Motions too, you will remember, that in the abstract are of an ambiguous nature, and may arise in any part of a cause, either before or
after

after a trial. Such, doubtless, you will allow are Motions for an Attachment — and for a Master's Report — and there may possibly be others, tho' I do not at this time recollect them.

§. 37. Every Motion hitherto has been supposed to have some relation to the trial of a cause; there are some few intirely independent of it — such may a *Motion for a Prohibition* be in many cases; such are many applications to the Court for summary relief on Acts of Parliament — as relating to articles of Clerks, to Attornies — Insolvent Debtors, and others of that stamp.

POLICRITES.

In this analysis you seem to have passed over the capital distinction of a court of Law considered as having civil or criminal jurisdiction: having so

fully discussed the former, I hope you do not mean to forget the other.

E U N O M U S.

§. 38. The Crown business (which was originally the only branch of the jurisdiction of the Court of King's Bench, and of which it still retains exclusive jurisdiction) must be treated of in a different method, from that I fell into in describing the course of Practice in causes between man and man. There I deduced the great outlines of Practice from a minute analysis of a civil action : the Practice of Courts of Equity may be deduced in the same manner, by attending to the several stages from the filing of the Bill to the Execution of the Decree. The conformity is so obvious that it is unnecessary further to unfold this idea by recurring to particulars.

The Practice on the Crown-side will not admit of the application of this idea : much the greatest part of it is independent of any solemn trial ; and the trials themselves are too simple to endure much interruption, or branch out into many points of Practice. I know not how to explain it better than by dividing the Crown Practice into such matters as originally commence in this Court ; and such as are removed into it from other inferior jurisdictions. Of both which kinds taken together (for we need not distinguish them minutely at present) are, Motions for an Habeas Corpus — for Mandamus's — to exhibit Articles of the Peace — Motions relating to the discharge of Recognizances, to remove Indictments, Orders of Sessions, Convictions made by Justices from their common ordinary course of proceeding

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ing by Writ of Certiorari into this Court, on some foundation of complaint against them. The visible Practice that occasions this removal, and that arises from it, may be resolved into these few Motions, very simple in their kind, tho' infinitely diversified as to their objects.

1. The general *Motion to remove* the Indictment, the Order or Conviction *by Certiorari*. 2. *Motion to quash* the Indictment, Order, or Conviction when it is removed. And in the case of an Indictment removed, either on a Demurrer it is set down to be argued; or *Motion is made to quash* it before trial, or *Motion in arrest of Judgment*, or *Motion for Judgment*, after the trial. The *Motion for a special Jury*, as well as some other Motions already mentioned, may accidentally be made in
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the case of an Indictment, as it is in a civil suit.

2. But the most extensive jurisdiction is involved in matters of original cognizance, whether it regards Indictments or Informations — or such matters as are entirely independent of either, or any solemn trial; such as begin and end on Motions: but of all this I need not be very particular.

There is little or no difference between an Indictment commenced in this Court, or removed from another county, as to the Motions concerning them. As to Informations, tho' altogether the creature of this Court, they admit but of three Motions — *the application to the Court to grant it* — when granted and tried, a casual *Motion in arrest of Judgment* on grounds arising from the Record itself — or where the charge in the Information
and

and the Verdict are both incontestable,
the *Motion for Judgment*.

§. 39. You must have observed,
there is a pleasing simplicity in Crown
Proceedings, that at the same time it
favours the Liberty of the Subject,
raises the dignity of the Law itself:
that at the same time it has stood the
test of ages, has stood unimitated
or unequalled.

POLICRITES.

Whatever may be said of them, by
way of commendation in this respect,
they have not however escaped censure
in another. In particular, the form
of Prosecution, by way of *Informa-
tion*, has been much inveighed against
when compared with *that of Indict-
ment*.

EUNOMUS.

Whether this has been done on just grounds may be worth while for us to stop and consider; and the rather, because the path is not so much out of our way as new in itself.

Let us see wherein they agree, and wherein they differ. They agree in this, that each is *only an accusation* of a crime; and where each has the same crime for its subject (as it may have in many misdemeanors) the punishment may be exactly the same: because supposing the punishment in such cases discretionary in the Court, the Court does not necessarily attend to the mode of prosecution, in fixing the nature or quantity of the punishment.

But they differ, it may be said, in this, that the accusation in one shape is more rigorous than in the other;
and

and that tho' the punishment, as to (the strict idea of it) the sentence of the Court, be the same, yet the consequences of one mode of prosecution being more severe than the other, one mode may be said to be much more penal than the other.

When I do most heartily give the preference to that of Indictment, as the most ancient, approved, constitutional form of proceeding, I must not be so partial as not to own an Information has its great use in many cases where an indictment can not be had; and that tho' an Indictment upon the whole is preferable, yet an Information has many peculiar advantages to the Defendant, that are overlooked by prejudice and inattention.

The most glaring circumstance that distinguishes the method by Indictment, and seems to give it so great a preference

preference to an Information, is the manner in which the accusation by Bill is made. In every Bill found by a Grand Jury, twelve persons at least must concur in finding the facts that are the grounds of the accusation. In a prosecution commenced by Information, only four can give an opinion as to the weight of the charge laid before them; a concurrence of three is sufficient to direct the prosecution; or even two, who may be the only persons present in Court. Setting aside therefore any supposition of superior abilities and greater experience resulting from the particular station of the persons who decide on the latter; it may be said, in a Judgment of facts (of which every man is presumed a competent judge) a Defendant has naturally a greater security for a right Judgment from a greater number.

ber. He has this advantage too in a proceeding before a Grand Jury, that if they judge in his favour, by throwing out the bill, he is entitled to his action against the Prosecutor for a malicious prosecution, in the same manner as if the Bill had been found, and he was afterwards acquitted on his trial : but tho' an Information is refused on application, or tho' the Defendant is acquitted on his trial, I do not know, that in either case, he has any remedy for a vexatious and oppressive Prosecution ; and yet the expence, which is the ground of the action in the first case, is much greater in every shape in the latter.

These circumstances tending to guard any one from an undue Prosecution, or giving him the means of avenging an attempt towards it, will naturally be considered as inclining
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the balance much in favour of Indictments. But then before the other Prosecution can be directed, a person has opportunities of defending himself, which he has not in the former. He can be heard on oath in answer to the charge made; and the Court judges on weighing the Affidavits of one side against those of the other: but a Bill preferred before a Grand Jury is a proceeding merely *ex parte*; it is an accusation which is to be answered hereafter: but this tho', as it precludes nothing at a future trial, it is no more than an accusation; yet as it undergoes so close an examination in the outset, may be justly considered as a kind of trial in itself. As such an enquiry therefore, when it terminates in conviction, induces a stronger presumption of guilt; it does
with

with more propriety aggravate the expence, if not the punishment.

But this previous examination is full as material in its consequences to the Defendant at the time of his trial, as it was at the time of making the charge. He can confront the witnesses with their own affidavits; and the credit of their evidence at the trial will depend on the consistence of it with their former account. And as this circumstance more easily leads to the detection of Perjury, it is in some measure an equivalent to the advantage in the other case from an action for a malicious Prosecution.

Let it be remembered too, that since the Statute of King William, this mode of Prosecution is on a much better footing than it was formerly, in which indeed it was open to very
just

just complaints. Now it must be either applied for in open Court, or filed by the Attorney-General, and not the Coroner, or Master of the Crown-Office, as it was before; tho' it has been supposed that the Bill was intended to have been much more comprehensive in its restrictions than it was, as it afterwards passed.

It is scarce incumbent on me to add, that most of the Motions that have been all along mentioned in considering the course of Practice, are attended with Affidavits, or sworn depositions in writing. Courts of Justice seldom give any credit to parties but upon oath: indeed, how could they, when each side would demand the like credit to their assertions, tho' what they asserted was in contradiction to each other? It is much to be doubted, whether the oath itself

upon all occasions deserves credit : but supposing it does in general, thus much may be observed of Affidavits, that the reason of the Motion being made, the perspicuity of the facts to be disclosed in it, and the opinion of the Court upon those facts, all depend ultimately upon them. An oath in all judicial transactions is the dernier resort in quest of truth : and so much is an oath regarded by the Court upon these occasions, that when Affidavits are full and positive, the Court has less room to go into circumstances. But when they are evasive and contradictory ; and while falshood, that must lay somewhere, is concealed, because the credit of the party falsifying is, as yet, unimpeached ; it would be impossible to come at the truth, without sifting the Affidavits themselves ; whence, by comparing the circumstances,

stances,

stances, it may be found (if possible) on which side the justice of the cause is placed: and where, for want of it, a miserable support is borrowed from enormous Perjury. It must be own'd, that iniquity, ripened by some experience, is often capable of framing such Affidavits; that, like Milton's Hell, they shall discover

“No light, but rather darkness visible.”

Sometimes, one would think, the success of the cause depended merely upon swearing last.

I can not but observe, there seems to be no crime that deserves its punishment more than that of Perjury; for no crime can have consequences more universally destructive. Does not every trial, and all determinations in Courts of Justice, whether life or property is at stake, depend upon evidence on oath? Among the arguments on every side of us, there is none that more

forcibly proves the use of Religion in society, than the general use made in society of this act of Religion, called an Oath. There is none, we may add, shews a greater contempt of Religion, than a breach of Oaths; and, in proportion, as Perjury gathers strength, and comes off with impunity, nothing bids fairer for the utter subversion of Law and Justice, and, in the ruin of them, for the dissolution of society.

But this is not the only, tho' the principal, complaint against some Affidavits. The matter of them is not only often false, but as often frivolous. Instead of containing positive assertions, as from their nature they ought to have, they are stuffed with impertinent stories and conclusions from supposed facts, instead of the facts themselves, that ought to be positively alledged. Often you will observe,

observe, the very language of Affidavits renders them suspicious, by being too artificial; as when countrymen express their knowledge of the facts they attest,—

Velut innati triviis ac pœne Forenses;
or when two Affidavits are too similar to have been made by different persons.

After these slight and general remarks on Affidavits, I have nothing further to observe concerning them, but that they may be distinguished as to their different subjects — either as they are Affidavits of Notice only; or as they go to the merits: and it is to the latter kind that what has been said above is to be applied.

§. 40. Now to recapitulate all that has been said in a few words — Practice in general, it appears, is either in Civil or in Crown Causes. In Civil Causes it is either independent of a

N 3 trial,

trial, or relative to it — If relative to it, arises either from something applied for before, or after the trial. As to Crown Causes, you remember, only one distinction was insisted on, either as Practice concerned the original jurisdiction of the Court, or such as is exercised, as it were, on appeal. And unless I was to read over to you a hundred printed Rules of Court, and the several Cases and Books on this subject (which, by-the-bye, I would not wish any enemy I have to do) I can not undertake to be more explicit on this subject.

POLICRITES.

After you have been at the pains of so long a soliloquy, I should be ashamed to attack you under any head but that of palpable omission. Though you have exceeded the stretch of the legal fiction,

tion, “ that makes the Term but as
 “ one day ;” and in this view of Prac-
 tice, may be said to have brought ma-
 ny Terms into one, or in more ani-
 mated phrase, “ have turned the ac-
 “ complishments of many years into
 “ an hour-glass^a ;” yet give me leave
 to say, you have in one respect put
 me in mind of a fly buzzing about a
 candle ; you have been round and
 round about the light without touch-
 ing it ; you have brought every part
 of Practice to the point of trial, and
 yet not said a word about the trial it-
 self.

EUNOMUS.

§. 41. Reflect a moment on your
 own comparifon, and you will want
 no answer. What would become of
 your poor fly, if he approached too

^a Prol. to Hen. 5.

near the light? The danger of attempting this subject would not be less; the difficulty of describing it would only prove the weakness of the undertaking. This field of Practice, I will own to you, I think, of all others, is the most extensive, and gives one of the noblest views of our legal constitution. But great as it is in speculation only, the idea of it in the abstract will fall very far short of what any one will conceive from a short attendance on the Practice. Besides, where should I begin? or rather, how could I say enough of the excellence of the form, regulations and improvement of Juries? of the incomparable manner of sifting truth in the personal examination of Witnesses? of the admirable display of reason and eloquence in the observations on Evidence, and the address to
the

the Jury? and of the extreme caution the Law has observed in so nicely separating the peculiar provinces of the Judge and the Jury; and when it has left the exclusive determination of the weight of Evidence to the Jury, the care it has taken that the Judge, in his recapitulation of the Evidence, shall repeat to them the material facts, naked, and undisguised with the deceitful colouring of interest or of eloquence?

POLICRITES.

§. 42. It is this “very colouring” that the world so much object to, and which, in many cases, makes truth so unlike herself, that it is not always easy to know her: so that if you decline expatiating on the excellency of this form of trial, I hope if it was only in regard to that, you will say a word

word about the abuse of it. The Judge and the Jury I say nothing of: indeed, in this respect, there is no room to say any thing; the mistakes of either, (as you have said) should they happen, may be set right after the trial. But the misrepresentations in other parts of the Proceeding are innumerable, and yet I know not how they are ever prevented. I will state the objections in the very words of an old Citizen, who having been so unfortunate the other day as to lose a cause of considerable value, and, as he conceived, from the perversion of Truth and Justice, not the want of it in his own case, very innocently took his revenge by abusing the whole Profession in a large circle of his acquaintance.—“ The story of the Cow (meaning, I suppose, Swift’s Cow) he said, “ was not more satirical than true; “ and

“ and it was far short of the real
“ abuse. A string of witnesses are
“ put into a brief, some of whom are
“ to prove that two and two may
“ make five, or that they never heard
“ they made only four, just as occasion
“ requires : or if they come inclined
“ to speak the truth, the other side
“ are prepared either to shew that
“ they are not to be heard because it
“ is barely possible they may have a
“ halfpenny interest in the conse-
“ quences of a possible determina-
“ tion ; infomuch that, I believe, if a
“ Testator in a Will of his Lands was
“ to leave one of the subscribing wit-
“ nesses only a halter, he would not
“ be admitted as a credible witness :
“ or else the cross-examination is to
“ be spun so fine that a man is at last
“ beat out of common sense, and is
“ brought to contradict himself a
hundred

“ hundred times without perceiving it ;
 “ or when every other topic fails, the
 “ witness is to be abused, because he
 “ does know what he is called for,
 “ or because he does not, or because
 “ he will not, say more than he knows.
 “ This raises a laugh among the coun-
 “ try people ;

Solventur risu Tabulæ.

“ and the Jury find for or against the
 “ Plaintiff, as the Defendant or the
 “ Plaintiff are made most ridiculous
 “ in the course of the cause.”—Thus
 far the old Gentleman,

E U N O M U S.

§. 43. And thus far will many peo-
 ple go when actuated by peevish dis-
 content. How apt are we in most
 cases to transfer the incapacity any
 where from ourselves ? No wonder if
 a man, judging of his own case, is
 induced

induced to think others in the wrong, who do not think as he does ; and according to the degrees of partiality in his own breast to call the event ill-luck—ill fate—or injustice. One could not else well account for one man supposing himself wiser or juster than a whole Court ; if it was not that he made himself a judge in his own cause : it is happy for us we are not. The kind of reflections you mention generally proceeds originally from the same circumstances the old Citizen was in ; and like all other scandal, once invented, is much easier propagated than refuted.

It is the duty of Council to represent their Client's Case according to instruction : that instruction is to be their indemnity on the one hand, as on the other every aspersion for which they have no instruction they are answerable

swerable for in a course of justice ; because as the Law will not permit even affidavits upon oath of the party, by going out of a charge, to be instruments of scandal, much less will it endure a voluntary abuse by a third person in going out of the course of evidence. On larger grounds, it may be said, every Agent of a Court of Justice (whether Council, Attorney or Officer) is strictly amenable to it for his conduct ; and as the Law for excellent purposes, in consequence of the trust reposed by any person in his Agents, will not oblige them *to disclose* the material circumstances of his case in giving evidence ; so will it not endure any body, under pretence of being Agents, to vent scandalous reflections without authority. This I mean to say as to any thing advanced during the hearing of a cause on any persons

persons characters independent of evidence. But the comments that are made upon the evidence produced, or on the consistency and behaviour of witnesses, can never, I think, be deemed scandal in themselves, tho' they may lead to it in the conclusion. If such observations on evidence were not to be made with the utmost freedom of judgment, the course of justice itself would be interrupted: the conclusion from these, if it does affect the character of the parties or the witnesses, is no other than what every moral agent (as such indifferent and unprejudiced) who happens to be present, must draw from the whole of the story he has heard.

And as to the personal ill-treatment of the witnesses, which your instance put does more than insinuate, whenever it does happen (tho' I hope it has
4 been

been oftener imagined than observed) there is always a power present able to controul it. But surely to contest the evidence by the strictest cross-examination, is by no means to be deemed scandal, even tho' in the result the veracity of a witness may be rendered questionable. In this respect, the most perfect scepticism is the direct road to justice; for truth is consistent with itself, and will stand the test of the closest examination: it is the only way to correct mistakes; and if Perjury is latent, to detect it and bring it to day-light. Cross-examination, I may say, is the *Rack of the mind*; it is the only torture the Law of England allows in the pursuit of truth; and it is a torture only to an evil conscience.

This will be an answer as to the severity of examination: as to the
humour

humour that incidentally arises in some species of causes, and is furnished by the figure, demeanour and course of evidence of some witnesses, it generally passes off lightly, and is not uncommonly equal on both sides: but the effect of it, as to its weight in the cause, I may venture to add, is as transient as the laugh it occasions. Besides, a very little observation is sufficient to convince every body, that the recapitulation from the bench, will easily divest any little prepossession in the Audience gained by a jest or piece of humour. Tho', in the mean time, I know of no transaction in life that may be more justly considered as a kind of *natural comedy*, than some kind of trials are: in which the story itself often exhibits a most diverting picture of mankind, especially when the main plot is animated by a kind of under-plot

that discovers itself in the peculiar characters and passions of the witnesses; many of whom, though they come with an earnest intention to serve the truth, yet when they are warmed with a little examination, are apt to intermix some little passions of their own, with all the vivacity of genuine humour and quick repartee.

POLICRITES.

§. 44. But what between the misrepresentation of evidence, the misinstruction as to witnesses, and their account being naturally imperfect as they were not concerned in point of interest to remember what happened, or never thought at the time it happened they should be called upon to give any future account of it; it has been objected to the Laws of England, and thought to be a great speck in our administration

administration of civil justice, that no person is allowed to speak for himself.

EUNOMUS.

The objection, to give it any weight, must mean, that no person can be a witness in his own case—for speak he does, or may, both on Record — and by the instruction he gives his Counsel as to the fact.

POLICRITES.

In particular instances, however, is not this complaint made with a seeming propriety, as involving in such cases particular hardships? A tradesman, suppose, delivers goods to the buyer himself, no-body else present; or to the buyer's servant, who has left the place and not to be found; the tradesman cannot be a witness in his own
O 2 case,

case, and having no other witness to prove it, must lose his debt.

E U N O M U S.

That the Law will not allow him to be witness, I grant; but it is not a clear consequence that he must lose his debt. Upon general principles, you must allow, it is extremely right, that the law will not allow a man to be a witness on oath in his own case: a witness in substance, tho' not in form, he is. He tells his own case on Record; and the circumstances of it by his Counsel. It is well in the main he is not heard on oath; what Perjury would it introduce? and few cases are so destitute of evidence as the case put. By the Law of England a man may oblige his witnesses to come: and if a material witness is absent for a time,
and

and may be had in a reasonable time afterwards, it is, you know, every day's practice to put off the trial till he can be procured.

But in reality the case put (though seemingly a great hardship) will rarely happen: the inconvenience, by being universally known, may in general be prevented. This Rule of Law is founded on excellent principles; and it is the happiness of our Law to be settled and known. A very little experience will teach tradesmen this piece of knowledge; and one would think no one in general would deliver goods not paid for without some caution.

But even in the case put, he is not absolutely without remedy; it is true he cannot be a witness at Law, and has no other on his side: but he has a remedy in Equity (as I should suppose);

pose) ; for, on the one hand, where there is as good a remedy at Law, none ought to be sought in Equity ; because Equity is in its nature to follow, not to take place of the Law ; and indeed it is the constant language of every Bill that the Plaintiff has no remedy at Law : it may thence, on the contrary, be inferred, that where he has no remedy at Law he must have one in Equity. A slight insinuation to the contrary, if you remember, was one of the articles of Lord Somers's Impeachment : tho' probably had it been attempted to prove the Allegation, it might have turned out that he meant no more by such declaration, than Lord Bacon before him did by his Jus precarium, or Right in Curtesy, for which he says there is no remedy at all.

Supposing then that in every case, where there is a right, properly so called,

called, there is likewise a remedy to obtain it (which, I believe, is one of the most universal maxims of our legal constitution). The tradesman, in the case put, if he can have no redress at Law, may make his demand in Equity ; the buyer will then be put to his answer on oath : if he denies the debt on oath, he may be indicted for Perjury, and the tradesman will then be a witness in a case in some measure his own in point of interest, tho', for the Crown, in a course of public justice. But then the admission of him as a witness is extremely consistent with the great principle of Law before insisted on. For the end of this prosecution is not a civil satisfaction, but public punishment : and tho' by the party's conviction of the crime, the debt in reality is confessed, yet the evidence of the feller, to support the conviction,

is not under that byas as it would be if the discharge of the debt was the consequence of it ; for he will then lose his debt, and the punishment for the crime will be his only satisfaction. But the seller in the mean time has many chances in his favour, which the strictness of Law did not allow him : the debt may be decreed in his favour, or if it is so flatly denied that no decree can be made, he has the chance of a dishonest man's being driven in time to a confession by the terror of an infamous punishment ; and so avoiding the prosecution by paying the debt. I have reasoned this case you have put more fully, because indeed I have heard the Law arraigned in this instance : and the case if it should happen, in all its circumstances, would be an hard one, tho', I think, with

with the most ordinary caution, it rarely will.

POLICRITES.

§. 45. I own you have some time ago exhausted my own cavils against our Law, and the general course of Practice: but, perhaps, there yet remain some disputable points which will be ever urged from without doors; and tho' to you, or myself, they are mere phantoms, yet, to a great part of the world, they are of those stubborn kind of spirits which it is not so easy to lay as it is to raise.

In two words, they arise from *the Delay* and *the Expence* of the Law. As to the first, by which a suit has been contrived to go for several successive generations, it reminds one of the Giant of Sirius's account to the Dwarf of Saturn, in Voltaire, of the
 Process

Process of a Law-suit in his country commonly lasting 250 years : but then it must be remembered, the Beings in our Planet have a duration of life more disproportioned to the length of a Law-suit, than the Hero of Micro-megas had.

And then the expence itself has commonly such a sting, independent of the delay of a cause, that it is thought if the Poor have a right, whatever becomes of the maxim, that every right has a remedy, the Poor not being in a condition to assert their right, must give it up. And as the Poor must in such a case lose their right, by not asserting it, others are in danger of becoming Poor, even by asserting it with success. A victory itself proving the sure cause of their ruin ; revenge is death ; two contending Spirits in a Law-suit, like Virgil's Bees,

Animas in vulnere ponunt.

Many

Many a Plaintiff, I doubt not, is obliged, like Tom Touchy in the Spectator, to sell the field, after having recovered in an Action of Trespass for breaking the hedge that inclosed it. Not to mention, that in every case the real costs out of pocket will greatly exceed the costs allowed by the Court to the party who succeeds in the suit.

EUNOMUS.

§. 46. Those who think dispatch the great excellence of Justice, will doubtless admire the quickness of a Turkish suit; and be inclined to prefer the determination of a Cadi (such an one as Shaw and Norden have described) to the administration of Justice in their own country. The speediness, as well as severity, of Justice in Turkey, is said to be openly avowed on this principle, *that it is better two*

innocent men should die than one guilty live. As we glory in adopting the very reverse of this principle, a greater caution in conformity to the principle will necessarily produce a greater length in the enquiry.

This apology for delay, arising from compassion, will, I trust, sufficiently vindicate the formality required in our criminal proceedings: and if the delay here was greater than it is, it might still be vindicated on the same principle,

Nam de morte hominis nulla est cunctatio longa.
 But it will be said, the principle is not at all applicable to the course of civil Justice, where the delay pinches most: and in general, I believe, there are many who have lived all their time in England, that have as little idea of a "Hearing being put off till
 "next Term," as the Czar Peter
 7 had,

had, when he was told the Prosecution for insulting his Ambassador was so deferred. But let us answer those who will hear an answer, by considering for a moment, to what the delays are unavoidably owing; and whether there is not less to complain of on this head now than formerly.

We must go pretty far back to trace the original of the slow and steady pace with which we are obliged to travel through Westminster-Hall: at least the two causes that strike me as affording the most obvious solution of the difficulty are of a very ancient date, if they are not beyond the reach of Chronology. I think, in general, the delay is to be imputed to the institution of Terms, and the general condition of the kingdom in early times: the latter cause assigned is indeed comprehensive enough to take
in

in the other. For the distance of these stated intervals for business may be very well accounted for from a view of the former condition of this country and its inhabitants. The institution of Terms, it appears from Sir Henry Spelman, was partly owing to the Religion of the times, which was not without a considerable mixture of superstition; and this was the occasion of shutting up the Courts of Justice all the time, but the summer vacation, which was governed by a consideration of harvest. The Vacations were considered in a religious view as the seasons of "true peace:" the vera pax being, I think, used in our old laws in this sense as synonymous to Pax Dei et Ecclesiæ, in opposition to Pax Regis, or the Peace of the Realm.

But

But the situation of the country itself very well justified the intervals prescribed for Returns of Writs, from whatever motives they originally flowed. Reflect only upon the difficulty of travelling from the extreme bad state of the roads ; no posts then instituted by which Process might be dispatched ; the Process itself all literally written ; now they are *writs* rather in name than in reality ; the common forms being printed with blanks, which are occasionally filled up.

Consider all this, and many other circumstances, which will occur upon a more careful recollection, and rather than blame the delay of the Law at those times, you will wonder with Sir Thomas Smith, “ that three Tribu-
 “ nals in one City, in less than a
 “ third-part of the year, should rec-
 “ tify

“ tify the wrongs of so large and po-
“ pulous a nation as this of England !”

And as it was not in itself in those times considered as so great a grievance, much less was it from comparison with the practice of other countries. Fortescue (if you remember) who was much in France, allowed us to have been much more expeditious in our proceedings than the Courts were there : tho’ the course of Justice under an absolute monarchy in its nature must be less interrupted with the delays of form than it is in a free country. The delay now (at least with regard to the Practice of Courts) is much less than ever it was ; one most certainly, tho’ not the most considerable of our obligations to the present administration of legal Justice ! How far it is yet capable of being further reduced, must be left to time and experience,

perience, rather than be hastily decided by an unripe theory, which in prospect of some imaginary improvements, may unawares strike deep on the very roots of the constitution.

§. 47. In the article of expence, I am afraid, you insinuated much more than you can support in point of argument. At least, I will say, if Poverty was a bar to Justice, the most golden clause in Magna Charta would be a dead letter: *Nulli vendemus, nulli negabimus Justitiam* would not be the voice of the Law, if the Law in its administration of Justice made the least imaginable distinction between Rich and Poor. I know of no case where Poverty is under an exemption or under an incapacity with respect to natural rights: if it was under the latter, it would be hard indeed it should not avail itself of the former.

1. No real Poverty however is an excuse for the commission of theft, or any other crime, in this, as it is in some countries; because in England the case of extreme necessity is not supposed to exist: nor indeed can it be supposed consistent with the provisions made by Law for the Poor, independent of other public or private contributions.

2. Nor is real absolute Poverty a permanent confinement even for just debts in every case; tho' such a confinement is not contrary to natural Law, however it might in some cases be not agreeable to humanity. In proof of which I need only remind you of the Laws particularly interfering to this purpose in the cases of Insolvents and Bankrupts.

The Insolvent and the Bankrupt Laws agree in this, that they are humane

mane expedients to reconcile natural Liberty with natural Justice. The Debtor, who is the object of the one system or the other, is to pay as far as he is really able to the Creditor; and upon that condition is not liable to be perpetually confined by his Creditor. They differ materially in many respects: the one regards only a particular debt, principally a small one, whether the debtor is in trade or not; the other all the debts which a person in trade has contracted.

For this provision of the Bankrupt Laws is founded on a regard to *trade* merely; which as its very being depends on credit, so that credit must often involve the individual who is concerned in trade. There is then a natural compassion due to an insolvent trader. He may innocently fail by his misfortune merely. But, at the

same time, there is a compassion due to his creditors ; and as far as he is really able to pay, so far he ought. By the supposition, he cannot pay all his debts ; it is agreeable therefore to good policy and natural justice, that he should divide all his effects among all his creditors. The great hinges then on which the system turns are these, 1. That for the benefit of trade in general, a real trader shall be permitted to regain his liberty, on surrendering all his effects ; and that any concealment of his effects, at the time he would avail himself of this indulgence of the Law, ought to be deemed highly penal ; and from a civil injury to the creditor, to become a crime to the State. 2. That his effects ought to be distributed equally among all his creditors, who prove themselves such : and the equity of this equal distribution

tion is still more apparent, because in consequence of this discharge, no one, who was then a creditor, can molest him for the future, whatever new credit or circumstances he may afterwards acquire in the world.

Two things however I cannot help adding, that it is injurious to trade and to justice to permit one really not a trader to be a Bankrupt: and that tho' one is discharged as a Bankrupt, and in point of Law a composition passes for payment, yet in point of conscience the obligation to satisfy the whole will revive with the power of doing it.

3. The Spirit of our Law would be humane to the Poor to very little purpose in such instances, if it in any degree deprived them of the means of suing for or defending their own rights. Indeed the constant practice of suing

or defending in *formâ pauperis*, in any Court in Westminster-Hall, would be an answer to the supposition, if the supposition was not so absurd as to require none.

As to the expence of Law-suits, it is often aggravated, no doubt, by the extravagance of the parties themselves: but upon general principles admits of a clear vindication,

And a very few words will convince us of this, both as to the allowance of costs in general; and, on the other hand, as to the limitation of that allowance, by making the costs, permitted by the Court in most cases, more or less to fall short of the real expence the party has been at. 1. Costs, in every civil suit, regularly follow the event of the cause. This is highly reasonable in itself, and a great improvement of the antient Law, by which
no

no costs could be had. It is certainly the only way of making it worth while to recover many rights; and, on the other hand, of punishing a vexatious suit, as no action lays for it. But in this latter respect the ancient Law is a little disguised. It amerced a Plaintiff *pro falso clamore*; it required pledges for prosecution; and it amerced a Defendant after verdict. Costs, however, at present are not universal. 1. Certain only on a Judgment obtained in an Action. 2. Discretionary in Motions, at the pleasure of the Court. 3. In criminal Proceedings, generally none at all; tho' here a party wrongfully indicted may reimburse himself by Action. In Informations he has a third part of the fine by privy seal; where the Defendant is not permitted to agree with the Prosecutor. In summary Convic-

P 4
tions

tions that are illegal, he has either an action against the Justices, or costs by Act of Parliament. There is one thing that does indeed influence the expence of a suit, which is not properly the act of either party ; and that is the expences on suits arising from the tax of the Government, which it may be thought perhaps is a charge unknown to former times ; and an enormous weight on civil Justice. To this it may be observed, 1, That most Governments do, in some shape or other, tax Law Proceedings ; and he must be a great stranger to the English Law who sets up former times in this respect as a contradiction to the present. In former times, it is well known, real actions were almost the only suits ; and in real actions the fine paid to the King upon suing out original writs, was always in proportion to the sum
in

in demand; and bore a much greater proportion to it than the stamp tax does at present. Nay, a fine was paid for compounding suits; and reasonably enough, as one party or the other must have been in the wrong to occasion any suit; and in the end must otherwise have been amerced to the King. And that general practice, on original writs, is the well-known origin of (what are called) the præ-fine and post-fine now paid on levying a fictitious fine, as an assurance of land.

But, 2. The enormity of this charge is in many cases not fairly to be imputed to the Law, but is more properly owing to the prolixity of proceeding: and then it is evident the party or his agents occasion the weight of the burthen they complain of.

And it is this very circumstance of one man, by his extravagance, ignorance,

rance, or prolixity, having it in his power to make a suit ten times more expensive than it need be, that makes it absolutely necessary for the Court itself where the cause is depending, to have a check over the party : and by its officers to regulate the proper degree of expence. For why should one man be allowed to be liberal out of another's pocket? The consequence of taxing a bill is, that your antagonist should reimburse you for the necessary expences you have been at in a suit in which the Court has judged his conduct unreasonable. But it would be very unjust, that if either side was clear in his conscience either that his antagonist has no defence, or the Defendant that the Plaintiff had no cause of action, yet he should determine to make the suit ten times as expensive as it need be, because

cause he knows the other side is to pay. The practice therefore of taxing costs is reasonable.

§. 48. And now, POLICRITES, as we have pretty well worn out our time, and our subject, as far as conversation will permit, let me ask you, raillery apart, does it not appear that the Law throughout is founded on reason and principle; not perhaps intuitively clear in every case, but easily reconciled to them, if we are but at the pains of a moderate investigation?

POLICRITES.

Not quite so moderate, when it must often be carried far back; and so many obsolete writers must be consulted, who in general have been long consigned over to dust and neglect in the corner of a study. Are not the Year-books, and much older witnesses, such
as

as Bracton and Fleta, now and then called on to prove the antiquity of principles, or to illustrate them by application? And when a witness is himself to speak by an interpreter, in my poor opinion, it adds something to the difficulty of examining his evidence.

E U N O M U S.

Those cases, it is true, will sometimes happen: for this circumstance must ever be attended to, that the Law of England is not only a Law of Reason, but of great Antiquity. This latter circumstance undoubtedly does it great honour as a positive system; but is often much in its way in other respects, as it tends to obscure many a particular doctrine, the reason of which we may sometimes lose sight of at this day. But then this circumstance, fairly considered,

considered, points out its own remedy ; the “ study of antiquity.”

§. 49. In our Profession, as in every other branch of study, an attachment either to antient or modern learning, exclusively of the other, is partial and ill-judged : the one is more immediately for use, where the other is more generally only for entertainment : but tho’ the application is entirely on one side, the illustration must often come from the other.

Any one who was to begin the study of his Profession with the perusal of antient books, would certainly begin at the wrong end. How unprofitable a fatigue would it be to commence our researches with the old doctrines of Attornment, Collateral Warrantys, and such antiquated titles ? A student might even endeavour to form an acquaintance with Lord Coke against his

own directions. He tells them, they should “first read the later Reports;” and he could not but foresee, that in giving this advice, He, like Aristides, was signing the shell that was to banish himself: for certainly what the year-books were then, Lord Coke in a great measure is now. The very same advice, if I remember right, Grotius gives as to the study of History; and there is the same reason in both cases. We propose in both cases to make our studies useful: and the state of times, laws, and languages, are in such a perpetual flux, that one who confines his attention to the state of things, as they were three or four centuries ago, may be as much a stranger to what is now doing, as Queen Elizabeth, if she was to rise out of her grave, would be at the Council

Council Board ; or Plowden, if he was now to attend at the Bar.

But Lord Coke, who at our first setting out is an advocate for modern Law, would think himself strangely misunderstood, if we were to cite him as an authority for stopping there. He promises no harvest to those who are content to reap in the narrow space of their own age : “ out of the old fields, “ he says, must spring the new corn.” And it will at least be an argument *ad verecundiam* in urging the necessity of the study of antiquity to Lawyers, to shew how much even those have thought it so, who themselves were no Lawyers. A book at my elbow has a passage of this kind, which, whether you recollect it or not, I am sure will entertain you ; I will read it.

“ I might instance (says Lord B-
“ lingbroke) in other professions, the
7 “ obligation

“ obligation men lay under of apply-
“ ing themselves to certain parts of
“ History, and I can hardly forbear
“ doing it in that of the Law ; in
“ its nature the noblest and most
“ beneficial to mankind ; in its abuse
“ and debasement the most sordid
“ and pernicious. A Lawyer now is
“ nothing more, I speak of ninety-
“ nine in an hundred at least, to use
“ Tully’s words, “ *Nisi leguleius qui-*
“ *dam cautus, et acutus præco actionum,*
“ *cantor formularum, auceps syllaba-*
“ *rum.*” But there have been Law-
“ yers that were Orators, Philoso-
“ phers, Historians : there have been
“ Bacons and Clarendons, my Lord.
“ There will be none such any more,
“ ’till in some better age, true ambi-
“ tion, or the love of fame, prevails
“ over avarice : and till men find lei-
“ sure and convenience to prepare
“ themselves

“ themselves for the exercise of this
 “ profession by climbing up to the
 “ *vantage ground*, so my Lord Bacon
 “ calls it, *of Science*, instead of gro-
 “ veling all their lives below in a
 “ mean but gainful application to all
 “ the little arts of chicane. Till this
 “ happens, the Profession of the Law
 “ will scarce deserve to be ranked
 “ among the learned Professions: and
 “ whenever it happens, one of the
 “ vantage grounds to which men must
 “ climb is metaphysical, and the other
 “ historical knowledge: they must
 “ pry into the secret recesses of the
 “ human heart; and become well ac-
 “ quainted with the whole moral
 “ world, that they may discover the
 “ abstract reason of all Laws: and
 “ they must trace the Laws of parti-
 “ cular States, especially of their own,
 “ from the first rough sketches to the
 VOL. II. Q “ more

“ more perfect draughts ; from the
 “ first causes or occasions that pro-
 “ duced them, through all the effects,
 “ good and bad, that they produced.”
 What think you of all this ?

POLICRITES.

————— Si sic

Omnia dixisset ———

He might, in a nobler sense, *still* have been “ *John the Saint* ^a.” Tho’ I do not think, by-the-bye, that his own times were so barren of examples as he represents them. In that respect he rather deserves the censure that has been cast by Dr. Middleton upon Virgil, for transferring elsewhere the palm

^a Alluding to Prior’s tale of Earl Robert’s Mice ;

————— estoons the Lord

Of *Boling*, whilome *John the Saint* ———
 and to the general character of his Philosophical
 Writings.

of

of Eloquence and the laurels of fame, which never flourished more than in his own country, and in his own age. And I can not but observe, that the noble Lord, notwithstanding the spirit and force of his style, has copied his rant much better than he has applied it. Instead of degrading his own times by the application, he might from those instances to the contrary in the profession (the *Somers's*, the *Holts*, and the *Harcourts*) whom he did know, have been taught to think, or at least to speak, with more modesty and candour of the *ninty-nine* whom he did not know. His notion however, in a liberal view, is highly commendable: it is right that a Lawyer, on proper occasions, should put on the Historian and Philosopher.

EUNOMUS.

§. 50. The dress is certainly becoming, though it is not always to be worn in public: but neither is the habit of the Profession. Our Terms and Vacations do perhaps, beyond any other employment, mark out intervals of hurry and retreat, of business and amusement. Our studies, more than any other, connected with the antient and modern world. Consider only as to the knowledge of antiquity, how much is done to our hands in the elaborate researches of Selden, Spelman, Dugdale, N. Bacon, and Madox: more particularly by those Writers who have connected ancient and modern learning; who have with great pains pointed out on any particular subject what the Law originally was, and in the room of which the modern is substituted. Such is Lord Hale, particularly

particularly in his History of the Law, and Preface to Rolle's Abridgment: such are Serjeant Hawkins in his Abridgment of Littleton and its Comment; and Sir Martin Wright in his History and Application of the Feudal Tenures.

§. 51. But leaving such matters of antiquity as are of a higher nature, and which point out their own consequence, how much of amusement is to be met with even from this quarter? In the history of the profession, its seats of residence, its various degrees of dignity, its diversions as well as its discipline?

There are traces yet visible that shew many particulars, with regard to our Profession, are of an ecclesiastical origin. The Coif is agreed to be the invention of the Clergy to disguise their Tonsure when prohibited to prac-

tise in the Temporal Courts; our Bands, our Habits, and general tenor of our Dress, tho' till the time of Charles the Second, they varied much, (as appears from comparing old Histories and Prints,) seem to proclaim the same original. The old Books seemed to have almost included Westminster-Hall itself within the pale of the Church. For instance; when they caution pleaders against too nice and technical conclusions in forming issues, that are to be tried by a Jury, they do it "because the *Lay-people*," they say, (meaning the Jury) "will not understand it." And Mr. Madox tells you, the Lord Chancellor was for a long time the King's *Chief-Chaplain*, and had the superior care of his Chapel, as well as of his Chancery. And the general and extended denomination of *Clerks* to the Deputies in Law-Offices, and thence,
by

by degrees, to all Offices whatever, are plainly owing to the circumstances of our Law-Offices having been originally, and for a long time, filled by some of the Clergy. That, in particular, the Six Clerks in Chancery were of the Clergy is acknowledged on all hands ; and it appears from the Parliament Rolls of 4 Ed. III. that the Lord Chancellor used to give the benefices under a certain value, the patronage whereof is in the Crown, “ to the
 “ Clerks in Chancery, who had long
 “ laboured in that place.” And hence, tho’ nearly on the eve of the Reformation, the Statute of Hen. VIII. was made to enable them to marry ; because tho’ the office was then chiefly filled by Laymen, yet the Clergy were not disabled from holding these offices, any more than the highest office in Chancery. Not but in this latter

case, usage, which began soon after this time, concurring with the extended and more difficult jurisdiction of the Court, requiring an education in this track, pretty well established the common Lawyers in the important trust of the custody of the great seal.

§. 52. And this connection of the Profession of the Law with the Church, does perhaps in part account for the Law itself having for some time no fixed residence for its Professors. That 'till within our time there was in point of education no connection between the common Law and the Universities seems pretty evident: and our Profession (tho' it has been abundantly made up to it since) had reason to lament, that every science, but the municipal Law, was taught there. The Law, in the earliest times of which
we

we have any notice, Lord Coke says, and other authorities besides a Record in 19 Hen. III, warrant him in saying, was taught in London by learned men of the Law, who sat up schools for that purpose. For Selden tells us, that before the reign of King Stephen, the municipal Laws were taught in the monasteries, in families of greater distinction, and, he adds, “in Academiis, Collegiis, Alibique.” But I know no evidence of history to explain the latter words as they have been understood to mean our two Universities. The inference from such historical accounts as we have is rather to the contrary. The words “in Academiis et Collegiis,” are equivocal, and do not necessarily import our Universities, properly so called. The very schools, mentioned from the Record of Hen. III. will bear the term : and Fortescue
and

and Lord Coke, though they both allow the Universities of Oxford and Cambridge were strangers to the study of our Law, do yet call the Inns of Court and Chancery by the very terms of "University and Colleges."

It seems to me not improbable, that the abolition of the Law Schools, by the prohibition that issued 19 Hen. III. might in part give occasion to a more regular course of institution, and fix the places of residence that we enjoy at this very day. The Temple, which was the earliest of them, appears to have been first applied to this purpose in Edward the Second's time. I leave the particular history of these noble seats of learning to the elaborate Antiquaries who have obliged the world upon this subject; particularly Fortescue, Lord Coke, and Dugdale, with
some

some dissertations of this kind read before the first Antiquary Society, and collected by Mr. Hearne. And I am not without hopes that the learned Body of that name *now subsisting* will in time permit these subjects to have some share in their curious researches.

There are some circumstances however respecting their situation and establishment I cannot altogether pass over. They seem to have been fixed in this spot, to be as much as could be in the center of the town, and yet out of the noise and hurry of it. And it must be owned their situation is admirably calculated, with this mixed view. They are at this day between the Cities of London and Westminster; and by their squares, courts, and spacious buildings, answer very well the various purposes of health, study, business and retirement. You may think

think perhaps they should have been nearer Westminster-Hall, the great field of practice ; and that their situation does not justify what (I said) was one end of fixing it, to be as near as could be in the center of the town. The times in which the Inns of Court were established will answer both objections. If we view London as the map exhibits it even in Queen Elizabeth's time, it will from thence appear, that noblemen's houses occupied all the intermediate space between Westminster-Hall and the extremity of the City. But could the Inns of Court have been fixed nearer the Hall, they would only have accommodated the Profession in one respect, and too much at the expence of every other convenience. After this slight observation on the convenience, reflect a moment on the delightfulness
and

and the dignity of the situation. Two of them on the bank of the River; and in those days the whole bank from the Temple to Westminster lined with palaces of the King and some of the first Noblemen of the kingdom: what the other two wanted in the view of the River, they made up in the extent of their Gardens.

Those writers who have called the Inns of Court and of Chancery by the name of an University, do by no means degrade the term according to its more genuine and strict acceptation. In the first place, the number of distinct houses (comprehending those of the Inns of Court and of Chancery, the latter of which are in subordination to the former) are not much less than the number of Colleges. But many internal circumstances will much better support the analogy those writers

ters conceived between them. It is easy in many particulars to run a parallel between the Inns of Court and the Universities.

They agree in each having several degrees to be taken by the Professors of their respective sciences; in various exercises required as qualifications for those degrees; and in the original institution of public lectures; tho' a disuse of these in the Law Societies has long made a breach in that part of the Parallel. By the Law lectures alluded to, I mean those readings on Statutes that have been in ancient times so great a channel of legal instruction, were delivered with so much pomp and grandeur, and derived so great an authority: of which the reading on the Statute of Uses is a sufficient instance.

The internal government too is, as to its nature and institution, as perfect

here as in Colleges; the Treasurer and Benchers having the same power over the members, by “the orders of “the houses,” as the Master and Fellows have by the Statutes of a College. If any thing, their domestic policy, tho’ under an Aristocratical form, is more extensive within the walls than it is in Colleges; because the *Bench* unite the legislative and the executive power over their Societies: as they not only execute orders in being; but can vary their orders or laws as occasion requires. Our Inns differ from Colleges as being possessed (I think) of no estates, exclusive of their own and the subordinate houses; their public incomes arising from fees on admittance of Members, and on taking degrees; from fines, in nature of penalties, for not doing exercise or paying dues; and from the profits of Chambers.

§. 53. The

§. 53. The degrees I mentioned in our profession are those of Serjeant at Law, Benchers, and Utter-barrister. The editor of Sir H. Spelman's work seems not quite so accurate in his manner of classing them: he reckons (if I remember right) *in foro regni*, in contradistinction from the *foro civili*, the degrees of Serjeant, Apprentice, and Barrister. But an Apprentice distinguished from a Barrister, and whom he places higher, never could be considered as a graduate, but a mere student.

That of Serjeant he has rightly placed as the highest degree of the Law, and of which no time traces the origin. Its history opens a large field of enquiry: at present it is sufficient to observe, that the antient splendor of this "state and degree" (as the writ always styles it) may be judged of from
many

many circumstances attending it at this day, but is more evident from others now obsolete. The antient manner of taking this degree still retained; the precedence those, who took it, so long had of the rest of the bar; their power of taking fines, and of sitting in circuit commissions, as Judges; the necessity of still taking this degree as a qualification for that Bench, added to a former circumstance of the Bench being rarely filled but by those who had for some time enjoyed this degree; all taken together tend to shew this order is a very antient, honourable, and vital part of our legal Constitution.

The editor of Spelman has not stopped to explain either of the other degrees: nor has Dugdale, tho' he has collected copious materials respecting both, been at the pains of sufficiently settling the nature of either. The term

itself however will serve to distinguish a Benchers from a mere Barrister. But the confusion arising from calling the latter more generally an Utter-barrister, without any explication of the term, has introduced much perplexity on this subject. And as I mean to read to you (what I have collected, in a very small compass) some of the particulars that Dugdale has so widely diffused about the qualification, and standing for the Bar, I shall be excused in going a little out of the way to explain the term itself.

Dugdale, instead of defining what is meant by "Utter-barristers," copies Lord Coke, who says, that out of Mootmen, after eight years study or thereabouts, are chosen Utter-barristers, that is, are called to the bar; tho', as I said, he does not account for the etymology of the term.

Neither does Cowell, whose definition however, as it is supported by the facts I shall after mention, is worth reading to you : “ Utter-barristers (he
 “ says) are such as, for their long
 “ study and great industry bestowed
 “ on the knowledge of the Common
 “ Law, are called out of their con-
 “ templation to practice, and in the
 “ face of the world to take upon them
 “ the protection and defence of clients.
 “ These are in other countries called
 “ *Licentiati in Jure*; howbeit, in mo-
 “ desty, they still continue *themselves*
 “ *bearers for divers years*, like the
 “ Scholars of Pythagoras, that for the
 “ first five years never adventured to
 “ reason or discourse openly upon any
 “ point of their Master’s doctrine.”

Blount (who wrote in Charles the Second’s time, about the year 1670), in his exposition of the term Utter-barrif-

ter, copies Cowell, in the passage I have read, as far as “*Licentiati in Jure* ;” he fixes the period of calling to the bar at seven years ; but says nothing of the silence either enjoined or practised after being called : tho’ it appears by the old orders made in James the First’s time, and continued till after the publication of his book, that such silence was in fact then enjoined. After mentioning exercises, usual before and after being called, he adds, “ They are called
“ Utter-barristers, that is, Pleaders
“ without the Bar, to distinguish them
“ from Benchers, or those who have
“ been Readers ; who are sometimes
“ admitted to plead within the Bar,
“ as the King, Queen, or Princes
“ Council are.”

Having thus, as I take it, shewed, that Utter-barristers, and Barristers simply so called, are in reality the same ;

same ; I shall now perform my promise in reducing into a very narrow compass what Dugdale has inserted a great number of particulars to shew, *viz.* what standing and what orders have been made, and what qualifications have been required for the standing at the Bar. I do it with a view of commending in the best manner, that is, from comparifon, the last order made for this purpose ; which, after reading to you fuch conclufions as I had formerly drawn from Dugdale, you will much better underftand and approve.

1. It appears that orders and regulations have from time to time been made with refpect to the qualifications required for being called to the Bar ; fometimes by the refpective houfes themfelves, in which each judged for itfelf, and no uniform rule was ob-

R 3 ferved ;

served; sometimes regulations were prescribed by the Judges for the common direction of all the Inns of Court; and sometimes by command of the King or Queen, with the advice of the Privy Council and Judges; as was the usual practice during the reigns of King James I. King Charles I. and King Charles II. But no instance till the other day (in print at least) appears of a voluntary and uniform concurrence of all the Inns of Court to establish one common set of regulations, which, well considered, reflects great honour on the present establishment.

2. The qualification in point of standing for the Bar, has been very different at different times. At one time, in the Middle Temple, it was twelve years; by many public orders no time was limited; but under a general description

scription of "convenient continuance," as in 36 Eliz. and 12 Jac. I. By later orders it seems to have been fixed to seven years continuance, as 16 Car. II. so in 38 Eliz. In the intermediate periods, where the time was fixed, it seemed to be "at eight years," as in 6 Car. I. and in the Middle Temple 16 Car. I.

3. It appears, that whatever qualification in point of standing was necessary in order to be called to the Bar, it was a constant rule to restrain for some time the practice at the Bar. At Gray's Inn, 13 Eliz. no Utter-barrister was to come for five years. By a general order, 3 and 4 Philip and Mary, no Utter-barrister should come to any Bar at Westminster under ten years continuance (tho' the meaning of that order seems a little doubtful). In 16 Eliz. 1574, it was five

R 4 years.

years. In 12 Jac. I. 6 Car. I. and 16 Car. II. it was reduced to three years after the call.

4. Some persons have entirely been excluded from being called to the Bar. It seems that those who had practised, were by these orders under a perpetual incapacity of being admitted into any of the Inns of Court; and therefore under a perpetual disability of being called to the Bar. The present order, in proposing a limitation, seems to be much more liberal, and more for the general good than an absolute exclusion. In 1 Jac. I. by a very solemn order (signed by Lord Coke, Lord Bacon, and others) it was required as a qualification, and made perpetual in its terms, that nobody should be admitted into the Inns of Court *that was not a gentleman by descent.*

5. To avoid these several orders being dispensed with by letters, corruption,

ruption, or reward, particular clauses (as in 36 Eliz.) as well as standing orders, made it expulsion in the Reader who called, and in the person who was called to the Bar.

6. Many orders restrained the number of persons to be called at any certain time; notwithstanding the other personal qualifications were complied with. And then it was a constant insertion in several orders, with a preamble declaring the reasons of such an order. The 38 Eliz. §. 4. is singular in this respect; for when it limits the number to be called, it directs the preference, *cæteris paribus*, to be given to those who most excelled in morals and literature; which circumstance indeed one would imagine afforded the true spirit of the other orders, while a limitation continued, tho' no such preference was inserted.

If it was asked, what is the general *utility* of regulations of this kind; and what in particular the *necessity* of them at this time? It might be observed, the number of Lawyers, as well as Laws in England, are supposed to exceed those of any other age or country. The Roman Laws, though greatly exceeding the system of Grecian Laws, had scarce any regulations as to the Lawyers in the age of the Republic. In the latter ages the number increased, and some qualifications were required. They could not be Advocates under seventeen years; they were examined before they were admitted as Advocates; and they had their various degrees. In the Athenian State, Orators or public Speakers (for Lawyers distinguished merely as such seem to have been of little regard) were to be thirty years old, unexceptionable in their
moral

moral character, and guarded in their behaviour as Orators, tho' only finable if not so; but no previous test of their abilities was required.

In England, our great and increasing body of Laws, though not so much to be lamented in itself, if it is in a great measure the consequence of freedom, is however a great argument in this case of the necessity of a well-regulated Profession requiring proper tests from its candidates. All your objections to Pleading and Conveyancing prove it. How ridiculous indeed to think an ordinary trade should require seven years apprenticeship, and a profession so extensive as in its turn to consult the affairs of all mankind, should require no preparation at all!

The present times perhaps require at least as much check as the past; because

cause proceedings are now all in English ; and any one might otherwise be called to the Bar without any previous study or qualification. But on the other hand, where there has been a learned education, completed at the University, and which happily for this age is the prevailing mode, much less time and application will ripen the mind for the Bar. I think both these circumstances are well attended to in the last order of 1762.

Thus you see have our ancestors taken the greatest pains to secure the knowledge and purity of the Profession, as well by way of education as conduct, through every stage. They could not take too much pains in this point, if we consider the character itself, as Tully has done ; tho' I think it may be said with more truth in England, than it ever could be of old
in

in Rome, *Juris-consulti domus totius est oraculum civitatis.*

§. 54. Our ancestors too, partly I suppose by way of indulgence and relaxation of younger minds, from the severity of a dry study, and partly to give the world a proof of their splendor and hospitality, chequered discipline with diversion; and with the weightier matters of the Law would mix the amusement and gaiety of the times. Not to repeat what Dugdale has collected of the expence and solemnity of the Christmas and Readers Feasts, kept within the walls of the Inns of Court; the *antique Masques and Revelries*, introduced upon extraordinary occasions, as to the grandeur of the preparations, the dignity of the performers, and of the spectators, at which our Kings and Queens have condescended to be so often present, seem to have exceeded

exceeded every public exhibition of the kind. Here too Dugdale has not been wanting in the pains he has taken to inform us ; and some farther materials are furnished by Lord Clarendon and Sir Bulstrode Whitlock.

Our judgment on matters of antient story is too apt to take a tincture from the manners of the age in which we live ; and then, if they happen widely to differ from our own, they must in this light appear deformed and ridiculous. This observation will sufficiently account for the profusion of raillery, our Poets have thrown on the particular diversions now before us.

Our veneration for antiquity, however, has at length, at a proper period, given way to good sense, which can never well consist with a scrupulous adherence to matters in themselves of the most perfect indifference, and quite
contrary

contrary to the spirit and general practice of the times. The Masques and Revels were not ridiculous as used by our ancestors, but would be so if kept up now ; because the diversions (which must always conform to the humour of the age) are as different now from what they were a century or two back, as the language, the dress, and general prevailing manners of those times, are from the present.

§. 55. And now after all, my dear Friend, what is there in the view we have taken that is really formidable? much less than the *twenty years lucubrations* of Fortescue, or the *six hours a day* of Lord Coke, will enable us to acquire those principles of legal knowledge, that are necessary in every branch of the Profession. To what degree they are to be applied is left for ourselves to determine. We may expand or contract
the

the sail as the wind favours or is against us in our course. And tho' it will be said very few of the innumerable adventurers who embark with a design of crossing this troubled ocean, do arrive at their wished-for port after a successful voyage; do we not often, in the mean time, attribute to ill success, what may perhaps as often be imputed to ill management?

Sometimes we take no pains at all: at other times we begin; but a sudden indolence, like a mist before our eyes, makes the difficulties that lie in the way appear so formidable, that the conquest necessary to our progress is too soon despaired of: and we give up this path to Fame as inaccessible. Very often impatience is our principal obstruction; we look at the top of the hill, without considering that to get there we must begin at the bottom:

tom: and that the higher it stands, the finer prospect indeed it will command, but the longer or the steeper will be the ascent.

Of the two extremes, presumption of success in an attempt (if it goes no farther than ourselves) seems more eligible than despondence; and the reason of it I can not explain more forcibly than in Virgil's words,

———“*possunt, quia posse videntur.*”

There is certainly this to be said in its favour, that those who doubt of success in any undertaking, will not exert their strength so much as those who are confident of it: and therefore, as far as want of success may justly, as it often may, be imputed to an undue exertion of the means in our own power, so far the want of confidence may be the occasion of ill success.

In this lottery, POLICRITES, (for the world at large, as to the influence of chance, or, to speak more properly, unforeseen causes on the fortunes and conditions of men, is itself a kind of lottery) the number of great prizes will ever bear a small proportion to the number of competitors. You, or any of your cotemporaries, may or may not in the end have the very prize on which you fixed your eye at the outset: but can he ever have it who takes his ticket out of the wheel before the prize is likely to be drawn? For our comfort, however, in this lottery of the Profession, there are comparatively but few blanks, if indeed there are strictly any. The time and labour we employ, which may be considered as the price of our tickets, must always produce useful knowledge; tho' the knowledge that is acquired

may not be attended with the profit or eminence that we expected.

§. 56. I can not give a stronger commendation of all I have been saying, than in the account of a neighbour of mine, who is just come into the country, whom I have thoughts of calling on this afternoon; and as I wish you to go with me, I will endeavour to give you a general notion of his character.

He is now turned of fifty; and after having been long engaged in the first business of the Profession, in which the world has been an ample witness of his abilities and integrity, he has secured an honourable retreat, at the very time one would most wish to enjoy it: and having declined higher honours, rather than missed of them, passes the remainder of his days with the perfection of his faculties, in a

quiet rural solitude. A retreat in life of this kind, reminds one of Longinus's admirable comparison of Homer's *Odyssey* to the *setting sun*: the picture of which seems to have been copied (or at least is as happily imagined) by Prior^a, who describes that sun with

“ *Its beams entire, its fierceness lost.*”

Agreeably to the criticks idea, there must ever be a great affinity between composition at any age, and the general character of the age itself. The fire of youth, and the calm of advanced life, will each in their turn give the prevailing cast to morals as well as writings. The person I am describing resembles, in the tenor of his manner and conversation, the evening of a fine day; exhibiting a clear serene light without dazzling the eye. True greatness will shew itself as much in retire-

^a Looking-Glass.

ment as in action ; at least to the few, who are capable of judging of it, tho' the world at large may think otherwise, or overlook it. A quick succession has almost worn my friend's memory out of Westminster-Hall ; which circumstance, He, as a wise man, only laughs at, as a seasonable check to the vanity of those who think to be remembered by posterity at a hundred years distance.

He is blessed with a family whom he has educated in every accomplishment suitable to his fortune and station ; and his example (which is always the best part of education) has inspired them with a regularity of conduct, and a harmony of temper equal to his own. He still shews his regard to his Profession by breeding up his eldest son to it. His notions in this respect, however, are something singular,

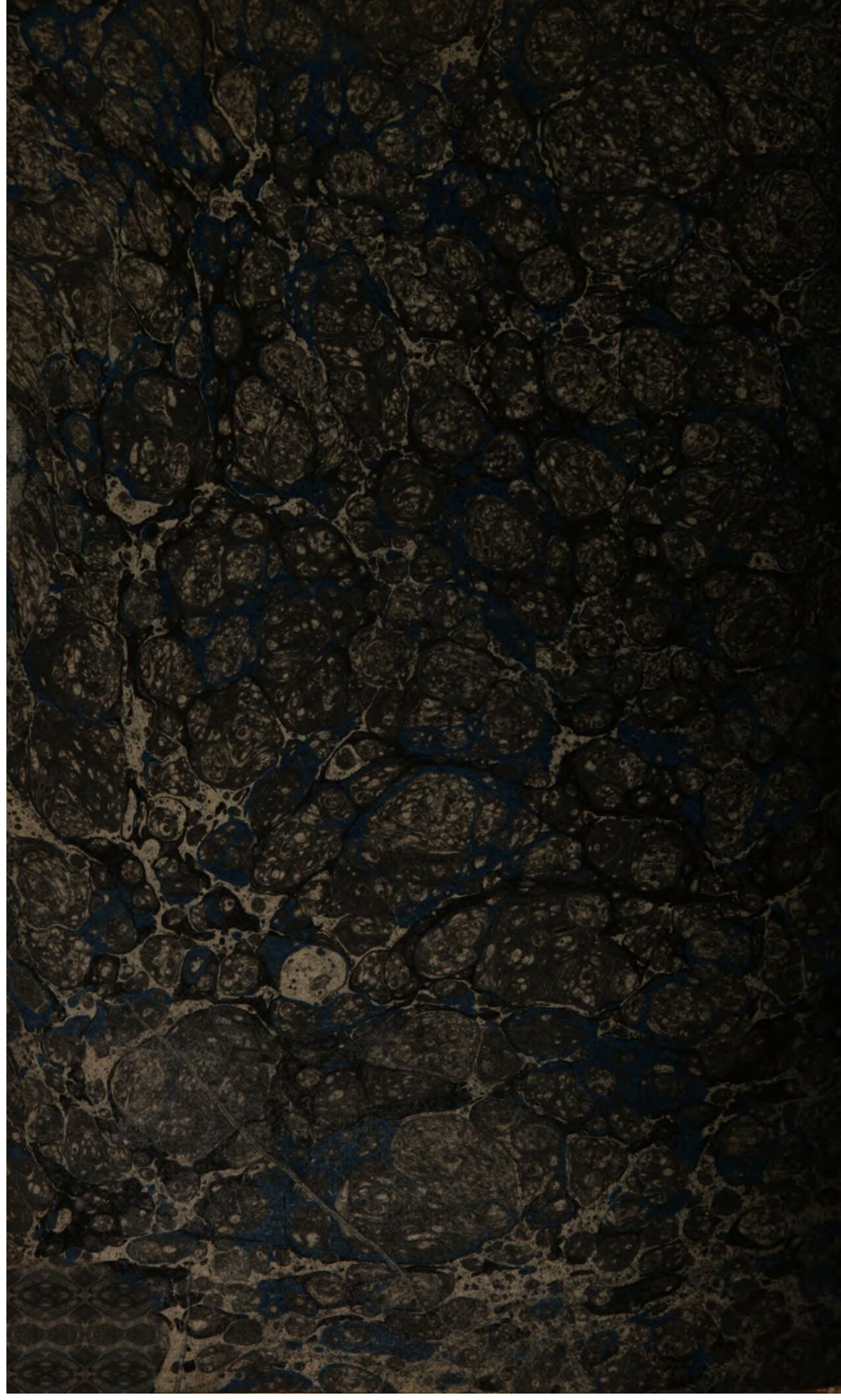
gular. I have often heard him say, it would be well if every gentleman of fortune had some insight into the knowledge of the Profession of the Law; which he would find the use of as a necessary part of education: as it would best enable him to understand the history and constitution of his country; would teach him best to manage his own concerns, without too much reliance on others; and would enable him to act with ease and credit on many of those occasions in life, where every man of rank ought to have some degree of legal apprehension, and without which he will be miserably embarrassed, whether he was called upon as a Juryman, an Executor, a Trustee, a Justice of Peace, or in the highest character, that of a Legislator.

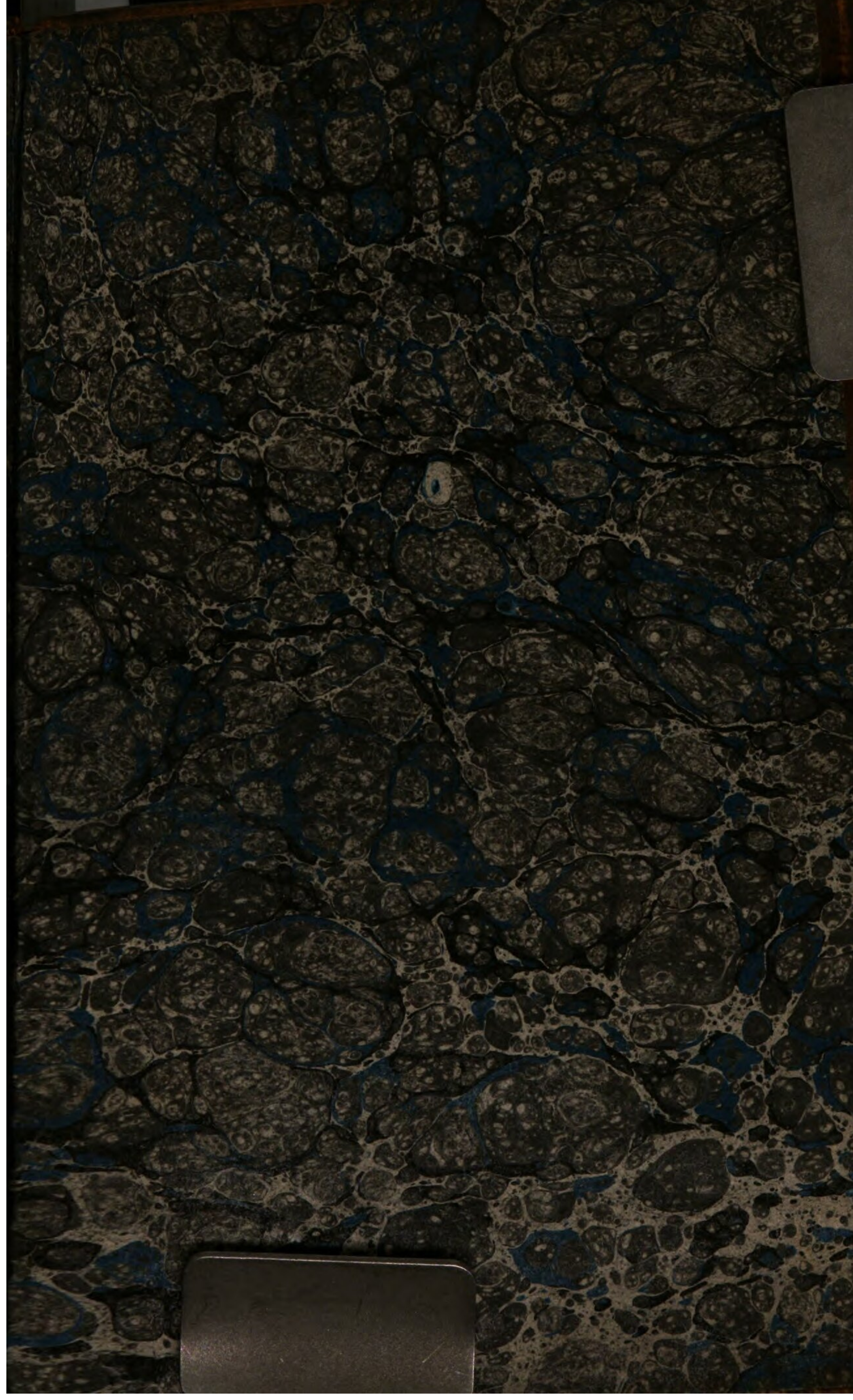
He used to add, however, that He would never breed up a son of his for
the

the Profession, if he could not leave him a competence independent of it; because he doubted much whether he could thrive in it at all events, without sometimes sacrificing more of his honour and conscience, than a man of any delicacy would wish for. He used to say, there was no employment where there are more temptations to act with latitude than in this. This notion of his, tho' singular, and not altogether, I conceive, well founded, may be accounted for from a great degree of natural modesty in himself, which, in reality, was a greater obstacle to him than he knew of. And he remains an extraordinary instance to shew, that great abilities, without some little ambition, will never reach the higher stations of eminence: but he is at the same time an instance to shew, that such abilities, joined with such moderation,

tion, can ensure a happiness that is very rarely to be had, tho' the utmost heights of ambition should be attained. To conclude this sketch of that excellent person; He still acts as a Lawyer in giving friendly advice to his neighbours; and they, on the other hand, are well satisfied with his advice; and, at his interposition, often part friends with one another, tho' they met with an aversion great enough to spirit up a prosecution. These are some of the principal out-lines of his character, that have some resemblance, I believe, as far as they go; but are by no means full enough to be a just portrait. You will much better finish it yourself from his company and conversation, to which I will introduce you.

END of VOL. II.





Wynne, Edward

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